S. HRG. 99-1004

PRODUCT LIABILITY REFORM PROPOSALS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSUMER

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

PRODUCT LIABILITY REFORM PROPOSALS

MAY 19 AND 20, 1986

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PRODUCT LIABILITY REFORM PROPOSALS

MAY 19, 1986

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON THE CONSUMER,
Washington, DC.

The subcommittee met, pursuant to notice, at 2 p.m., in room SR-253, Russell Senate Office Building, Hon. Bob Kasten (chairman of the subcommittee) presiding.

Staff members assigned to these hearings: David Zorensky, staff counsel; Andrew Koppelman, professional staff member; and Amy Bondurant, minority staff counsel.

OPENING STATEMENT BY SENATOR KASTEN

Senator KASTEN. The subcommittee will come to order.

Today the Consumer Subcommittee begins hearings on product liability reform proposals. Our only witness today, the Secretary of the Department of Commerce, the Honorable Malcolm Baldrige, will speak on the product liability problem that faces us today, and the administration proposal which I have introduced as an amendment in the nature of a substitute to my own product liability bill, S. 100.

Mr. Secretary, we look forward to your testimony this afternoon. You have been a strong leader in the fight for product liability reform, and your testimony here today along with that of Attorney General Meese tomorrow is itself clear and, I believe, compelling evidence of the administration's commitment to take action on this issue, and to become actively involved in the reform process.

Clearly, the time for action on this issue is now. Our committee has been studying the current product liability system for a full 5 years, and I believe an overwhelming majority of my colleagues on both sides of the aisle now recognize that this system is urgently in need of reform. I only hope that we are not too late to act this year, because I think a legislative solution is necessary this year before the Congress adjourns.

A recent survey in Wisconsin revealed that a full 10 percent of small businesses in Wisconsin might be forced to close if the liability crisis is not solved and solved soon. I am proud of the small businesses of my State. I am proud of the products that they make and the services they provide. With rare exception the products manufactured in Wisconsin are among the highest quality and safest products made anywhere in the world, yet many of these manufacturers cannot find, let alone afford, product liability insurance.

One of the problems that a number of them are having is, even when they have had no record, even when they have no claims against them, nevertheless they still are having difficulty in getting product liability insurance or in certain cases of being turned down completely. A number of reasons for this terrible situation were identified in the report of the administration's Tort Policy Working Group. These included a rapid slide away from the fault concept toward absolute liability, the huge transaction costs of the product liability system, based to a great extent on attorneys' fees, runaway damage verdicts, and a lack of uniformity and clarity in the rules of law relating to defect of product designs and warnings.

Since the working group's conclusion on the causes of the product liability explosion are similar to those presented to the subcommittee in the past, it is not surprising that much of the approach taken by the administration to product liability reform is consistent with legislation which I have introduced in the past three Congresses. The administration's reform proposal, which I was proud to introduce, constitutes a direct attack on the product liability problem.

I applaud the work of Secretary Baldrige, Attorney General Meese, and the entire Tort Policy Working Group. At the same time, I would like to congratulate Chairman Danforth for his leadership on the overall product liability effort and for his leadership on this critical issue. Both Chairman Danforth's revised bill which he introduced last week and the administration proposal addresses most of the problems that I believe must be dealt with as part of good product liability legislation.

Chairman Danforth has expressed his willingness to work with all the members of the conference committee to revise further this new proposal. I am confident the chairman's legislation can form the framework for a product liability reform measure that will have a broad base of support.

Mr. Secretary, we welcome you. Before you go forward with your testimony, I would like to ask Senator Danforth if he has any opening statement.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. Senator Kasten, thank you very much. Mr. Secretary, thank you for being with us. We have been at this issue now for I do not know how long. Senator Kasten really has taken the lead on it. He introduced S. 100. As I recall, we could not get that bill out of the committee on a tie vote. We are back at it again. I think that in this committee there are, what, 17 members. There are probably six or seven who are just against any product liability bill. My concern is that for the remaining, say, 10 or 11 Senators there are probably 10 or 11 strongly held, mutually contradictory opinions on what we should do about product liability.

I have offered several suggestions of my own and my view now is that we should just get on with it. So we will have a hearing tomorrow which my guess is will last most of the day. It will be chaired by Senator Kasten, and then we plan to have a markup on June 3, and let us just see where the votes are. I am not sure where they are. Senator Pressler, I know, has had some ideas on product liabil-

ity. Maybe we cannot form a consensus, but I think we are just going to have to try. So that is what we will be beginning on June 3.

I think that everybody has had sufficient time to think about the options, maybe not to form an opinion on them, but at least to think about them. We really have had a number of ideas that have been put before us. We have had a number of days of hearings. Many witnesses have testified before this committee and various subcommittees. Senator Pressler chaired a subcommittee hearing some months ago on this subject. Senator Kasten has chaired hearings. Senator Gorton has introduced a bill. There have been a lot of people who have been involved this process.

Now, let us find out whether we can pass a bill.

Senator KASTEN. Before we begin, Senator Hollings, do you have an opening statement or comment?

OPENING STATEMENT BY SENATOR HOLLINGS

Senator HOLLINGS. Well, having heard those two, I do. It reminds me, Mr. Secretary, of the days of an old ship during World War II. The admiral said, "When in danger, when in doubt, run in circles, scream and shout." When it comes to product liability, there is a definite concern in this country and the various States and State legislatures have been responding.

A freshman in law school would learn immediately that actions for wrongful death or injury are relegated under the police powers to the several States. If you have diversity, or special Federal employees tort liability, or special statutory provisions, then you go into Federal court. But over 90 percent of all tort cases are brought in the several States. Certain questions such as whether or not you should have punitive damages or to what extent, will vary within the States. The trial judge can, in effect, eliminate punitive damages in my State of South Carolina. I wish I had every one of the Federal judges up here. They will tell you there is no product liability crisis in the State of South Carolina. I have asked.

With respect to actual damages, judges also have the power under the South Carolina practice to, in effect, cut the actual damages. I do not go along with a categorical finding about runaway juries, because the courts are provided with the power to reduce awards.

The insurance services office made a study and found that for every dollar paid with respect to the costs, there was an average of 42 cents defense costs and 33 cents plaintiff's costs. The distinguished chairman's statement a minute ago contained an assumption about plaintiffs costs. But the defense has the incentive to delay the case, as defense lawyers are paid by the hour. Somehow I know we do not like lawyers. We recommended last year when they had difficulty with animals being abused in the testing of drugs that we used lawyers instead. There was a greater supply. They are more nearly like humans. And you did not become attached to them.

I know we are all against lawyers, but I am for the States and the system, and particularly for the Reagan federalism. I am amazed to hear that President Reagan, who was overwhelmingly

reelected on trying to send things back to the local level, is trying to preempt the local level with a federalization of the police powers of the States. Groups who share my views on this include the American Bar Association, the National Association of Attorney Generals, the State Association of Supreme Court Chief Justices, and the National Conference of State Legislatures. You can go right on down the list of those who opposed all of these Federal product liability bills. The test should not be whether we have been here 3 years or 30 years on this particular subject as whether we have been properly disposed toward it.

I think we are totally and improperly disposed toward it. It is the function for the States, and they are beginning to deal with tort reform within the State legislatures. The first question I asked the staff was about the recent legislative proposals. They said, well, you have got the Danforth proposal, the Kasten proposal, the administration amendment to the Kasten proposal, and the Gorton proposal. That is why I say, "when in danger, when in doubt, run in circles, scream and shout," because we continue to have so many proposals. I say, well, now, the formidable one, Senator Kasten's, does it as a Federal finding provide for a Federal cause of action? No.

What we want to do in all of these measures is put down Federal rules and guidelines to be interpreted by the 50 State supreme courts and judicial bodies. It would creat chaos. The proponents talking about simplicity and diminishing the cost and the administrative bureaucracy, yet are compounding it. This is one of the big reasons the American Bar opposed the Federal bill. They never have found a Federal cause of action and said let us just federalize the tort system. They just said, wherever you are in your State, we are going to put down certain guidelines. It is still a constitutional question.

I understand this question was diminished somewhat in the finding by the Supreme Court with respect to the hourly wage, I think it was, decision here later last year. In any event, I appreciate your appearance. I am just wondering why the Reagan administration, whose key and cardinal principle has been one of federalism and sending it back to the local level, would want to bring this up. We have got so many things in your particular department relative to international trade that we have not been able to get on top of.

We have plenty of work to do for this Commerce Committee other than to come in and federalize the tort system, and I am anxious to hear why you think that is necessary and appropriate and how you intend to deal with it. Thank you.

Senator KASTEN. Thank you, Senator.

Senator Pressler.

OPENING STATEMENT BY SENATOR PRESSLER

Senator PRESSLER. Thank you very much, Mr. Chairman.

I hope we are nearing the end of a long committee process, and I hope we do reach an agreement soon. I am sure we will. I am optimistic that we will finally succeed in moving this legislation on to the Senate floor. I recall a year or so ago when we failed by one vote to pass a bill on to the Senate floor, but the primary reason

for my renewed optimism is the formidable and growing political pressure from across the country. This effort is not considered a special interest effort. The average citizen of this country is very concerned about the cost of products, the cost of insurance, and all of the spinoffs.

I have seen an increasing consensus coming from the grass roots level that Americans are tired of endless lawsuits, the frivolous claims, and the inequities in the present system. They have seen the results of today's product liability system and are demanding reform. I have received literally thousands of letters on this issue, and every time I go back to my home State, I hear more complaints.

Our present system is a mess, and we must take steps to correct it. Manufacturing and innovation are being inhibited. Liability and insurance costs continue to drive up product prices. Domestic and international trade is stifled. Injured plaintiffs must wait years for recovery, most of which goes to the lawyers. And thousands of small businesses, indeed entire industries, are being driven out of business every year.

As it stands now, the only truly redeeming grace of the present system is that it provides a very good living for more lawyers than we could otherwise accommodate. Today and tomorrow we will be examining in detail the two proposals now before us. I have always been and remain a strong advocate of product liability reform. By and large, I will reserve comment on the specifics of either approach today. It would be counterproductive in my judgment to talk in terms of favoring one proposal over the other.

I agree with statements of the chairman that we need to remain flexible in our approach to product liability reform, and I applaud his efforts in this area. We would be served best by focusing our attention on wedding the best aspects of each of these proposals along with other suggestions made throughout the process. There is one issue, however, about which I feel so strongly that it is appropriate to discuss it in advance of these hearings. That is the issue of joint and several liability.

This March I introduced an amendment to S. 1999 to reform the doctrine of joint and several liability. I discussed it in some detail then and will not repeat myself today except to emphasize that I believe we must adequately address this issue in whatever product liability package emerges from this committee.

I was pleased to note the joint and several approach in the administration proposal. I was also pleased to see some movement toward joint and several reform in the chairman's proposal. But I still intend to offer my amendment, which goes further in the joint and several area. I have roughly 40 additional letters of support which I would like to insert in today's record as a followup to similar letters in the March 11 record. They are all in support of the amendment and similar in content to one I received from the U.S. Chamber of Commerce which reads in part, "Nothing is more fundamental to meaningful product liability and civil justice reform than revising laws pertaining to joint and several liability. The chamber supports your efforts to reform the joint and several liability doctrine."

Since I introduced my amendment last March, I have circulated it widely to ask for comments on the language. We have received many useful suggestions, and I will be submitting a revised amendment at tomorrow's hearing. It does not alter the substance of my original amendment. It simply clarifies the definition of concerted action and simplifies the existing language which was modeled after a recent Kansas statute.

With that, I will close my opening remarks so we can get on with the hearing and the important task of product liability reform. I ask unanimous consent to insert the roughly 40 additional letters of support I have for the joint and several liability amendment.

Senator KASTEN. Without objection, the letters will be inserted into the record.

Again, Secretary Baldrige, we welcome you. We thank you for your testimony today. We appreciate your past efforts in this area, and we look forward to working with you to ensure that product liability reform legislation is enacted in the 99th Congress.

Mr. Secretary.

STATEMENT OF HON. MALCOLM BALDRIGE, SECRETARY, DEPARTMENT OF COMMERCE, ACCOMPANIED BY DOUGLAS A. RIGGS, GENERAL COUNSEL

Secretary BALDRIGE. Thank you very much, Mr. Chairman. Seldom have I been so well briefed by a committee that I am testifying before. I must say before I start, Senator Hollings, that it is not that I dislike lawyers. It honestly is not. It is just that I would like them twice as much if there were half as many of them.

We are addressing a specific point on American competitiveness when we talk about this, because the product liability costs abroad of our trading competitors run from 1 to 5 percent of our costs. That is a significant economic competitiveness barrier for us. I want to thank the chairman of the committee for accommodating my schedule and allowing me to testify today. I understand Assistant Attorney General Willard and Doug Riggs for the Commerce Department as well as Attorney General Meese will testify tomorrow, so I appreciate this opportunity.

Many businessmen consider this to be the No. 1 economic issue facing the country today. That is the need for tort reform, particularly the reform of our product liability system. We need product liability reform now. The proposal announced by the Attorney General and myself on behalf of the President and introduced by Senator Kasten as a substitute for S. 100 will go a long way toward improving that system.

We are hearing from literally hundreds of businesses from across the Nation who are complaining about the 200 to 300 percent and more increases in their liability insurance, and as premiums rise, more areas of coverage are narrowed. Some businesses are reporting an inability to obtain liability insurance at any price. This is a crisis no matter how you look at it. The problem affects a broad spectrum of businesses—from construction equipment manufacturers all the way to day care centers, from the aerospace industry to manufacturers of child safety seats.

Small businesses are particularly affected by the crisis because they have less leverage in negotiating insurance rates and are less able to self insure or use other insurance alternatives. I think that is a very important point. We are talking about hurting small business more than anyone else.

While a number of courses have been suggested for this crisis, I think that a major contributing factor, particularly the area of product liability, is the excesses which have crept into our legal system.

In the past 25 years our system has moved away from liability based on fault as its basic guiding principle. This movement away from fault stems from a belief that businessmen can and should be found liable merely because they have a deep pocket filled with profits on which they can draw to compensate a person for a product injury. There is also a growing belief that the user of a product has little or no responsibility for his injuries. What every chief executive officer fears today under our present system is that if you manufacture or distribute a product, you stand a chance of being found liable for causing an injury even though you acted responsibly.

Another reason for the need for reform is the patchwork of different State product liability laws which make it difficult for businessmen to determine which legal standard will apply to them or whether a particular standard will remain constant. The Federal Government must take a leadership role in the process of developing a coherent product liability system. It is our responsibility to regulate interstate commerce for the good of the entire Nation. The movement of products in interstate commerce is truly a national problem. It is a problem which requires a national solution.

Our proposal takes on that leadership role, but does so without unnecessarily infringing on States' rights. For example, cases are not removed from State courts. And, the bill limits the preemption of State law only to the extent that it is inconsistent with the limitations contained in the legislation.

Also, the enormous transaction costs associated with litigation, which all parties bear to some degree, are out of control. They overburden the system. It is so difficult to justify extraordinary transaction costs, but it is particularly difficult to justify them when they are being borne in part by the injured party and ultimately by consumers who must pay through higher prices for goods and services.

Our proposal will promote the interests of consumers and protect a free flow of goods in commerce by placing reasonable limitations on the excesses of the current product liability law. It will do so by arresting the lottery mentality which has become associated with our system. The bill will ensure that the product liability law operates to compensate injuries caused by the wrongdoing of others. It will do so by returning the system to one based on fault, and by ensuring that a person is responsible only for those damages directly attributable to his proportionate share of that fault. The bill will also reduce the unacceptably high transaction costs associated with litigation by establishing a sliding scale for attorney contingency fees that decreases as the amount of an award increases. Finally,

the bill will help eliminate excessive awards by placing reasonable limits on noneconomic and punitive damages.

Mr. Chairman, we cannot afford to allow the product liability crisis to continue to go unchecked. This crisis has a detrimental effect on U.S. productivity and competitiveness. As the costs associated with our product liability system, including the costs of liability insurance, climb upward, those costs will be reflected in higher unit prices, and already are, as a matter of fact, which will make U.S. products less attractive in both domestic and foreign markets.

We will see more companies discontinuing their products. For example, G.D. Searle has announced it will stop selling its Copper-7 contraceptive device because of product liability suits. A company in Kansas that manufactures hospital equipment has decided to stop making anesthesia gas machines because of the liability crisis, leaving that market to foreign-owned manufacturers. Manufacturers of child car seats are assessing whether or not they should withdraw their product from the market. In 1984, one of the manufacturers of DPT vaccine for children discontinued its production of the vaccine until an insurer was found. And a small business in Virginia which specializes in devices to assist handicapped people in driving cars has stopped selling its products.

These are just a few instances that we know about where the product liability crisis has hurt U.S. businesses and consumers. I need not remind you, Mr. Chairman, that as U.S. manufacturers remove their products from the marketplace, those shelves will be filled with foreign-made substitutes. What we do not know about, Mr. Chairman, are those instances of lost opportunity where products have not made it to the market because of the costs associated with our liability system or because of the fear of a lawsuit.

Decisions like this can only hurt our overall economic growth. In addition to higher prices, socially beneficial products will no longer be available. Some manufacturers, mainly small business, are shutting down, thus creating a loss of jobs. In the end, we will all suffer.

That concludes my testimony, Mr. Chairman. I would be pleased to answer any questions that you may have.

Senator KASTEN. Mr. Secretary, we thank you. I agree that the product liability problem is the No. 1 problem facing the Nation today, and I also agree with your emphasis particularly on small business, but both you and Senator Hollings and, I think, a couple of others of us talked about the overall system and international trade. I would just like for you if you could to expand upon this—what effect, as specifically as you can. I do not know that we have any numbers that quantify this, but what effect is our current product liability system having on the international competitiveness of the United States?

How would the enactment of our proposal help this situation if in fact the product liability crisis is having a detrimental effect on U.S. trade? Some of us look at the product liability costs as, if you will, an additional tax on all products that are now being manufactured in the United States of America because the cost of the insurance is so great.

Cessna Aircraft, I guess, says it is going to stop making some of the smaller airplanes, like the 150 and others, because they are at

a point where the cost of the product liability insurance was 25, 30, or up to 35 percent, I understand, but specifically what effect, Mr. Secretary, is the current product liability system having on U.S. international competitiveness?

Secretary BALDRIGE. First, Mr. Chairman, there was a recent study by the American Textile Machinery Association that found that foreign manufacturers of machine tools and other hardware used in the workplace pay about 1 to 5 percent as much for liability insurance in their home markets. In Europe and Japan employees rely on workmen's compensation payments for workplace injuries rather than on suing. It is hard to translate that into actual dollars, but it is clearly a major cost factor.

Our companies, whether large or small, if they sell outside the State or have their products used outside the State, which obviously happens more often than not, may make the product in one State, sell it in another State, and it is used in the third State. So if you were a manufacturer, you would have to look at what has happened in all 50 States, the way the awards have gone, the way the State laws are written, and base your own costs and insurance on the worst possible premise. If that gets too expensive, you can just self-insure, but too many companies do not and cannot take that kind of a risk.

Now, you put those facts together, and it's impossible to put an actual number on it, on how much more business we would have if this new administration proposal was taken. Clearly we are dealing with major cost factors, and clearly we are dealing with cost factors that are getting worse, not better. I mean, the curve is ascending. It has not just leveled out.

Product liability costs to American manufacturers has gone up 61 percent in the last 10 years. And there are so many examples, but just let me give you one. It will not take too much time.

The Philadelphia transit system, I think it is called the Southeastern Pennsylvania System, but it is the system in Philadelphia, has just raised their fares from $1 to $1.25. They said 22 cents of that was based on increased product liability insurance kinds of costs. The fact is that in the last 6 years, that particular transit company had 14 percent fewer accidents or incidents, as they call them—they lump them together. But with 14 percent fewer instances, they still had 55 percent more suits.

This is a snowball, Mr. Chairman, and if we do not stop it, we are going to be sorry because of employment, because of products being withdrawn from the marketplace, and because of the harm it does to the people who give the jobs, and that is the manufacturers.

Senator KASTEN. Before I call on Senator Danforth, I would just like to say to the committee we will not use a system of lights, but I am hoping that we can limit our questions to roughly 10 minutes apiece as we go through, and we might have a chance to come back then. I'm not sure everyone will want to take 10 minutes. We might have a chance then and ask Secretary Baldrige another round of questions, if that in fact is necessary. Senator Danforth.

The CHAIRMAN. Mr. Secretary, your bill would limit the amount that attorneys could receive.

Secretary BALDRIGE. Yes, sir.

The CHAIRMAN. This committee over the past number of years has had before it a variety of deregulation measures relating to transportation, and the basic position we have taken with respect to other trades and businesses is that it is best to get the Government out of the business of regulating what people can charge for their time or for their service.

Do you view a limitation, a statutory limitation on attorneys' fees as being contrary to the basic philosophical trend we have been taking on other matters, for example, with respect to trucking or railroads?

Secretary BALDRIGE. I think it is one of the best parts of the bill, Senator.

We do not have a free market in that area. You do not see lawyers in the practical, real world, with regard to contingency fees, which a lot of these are, competing by cutting their price, in essence by saying, well, that other lawyer said he would take this case for 38 percent of whatever is granted, I am willing to take it for 22 percent. You just do not see that happening. If it does, it is very seldom.

What you see lawyers competing for is how much money they can get you. The 35 percent stays kind of standard, but one fellow will say, well, I think we can get you $1 million, another one only gets you, did not want to go above three quarters of a million or something, something of that order.

The CHAIRMAN. Why is a competitive marketplace for lawyers services not as good as the competitive marketplace for trucking or for railroads or airplanes?

Secretary BALDRIGE. Well, it really is not a free market. We see lawyers, as I said, competing on the amount of potential moneys they can get from the court or the jury and not on the basis of what their contingency fee will be, and as someone pointed out here earlier, we see many, many instances where one-third of the moneys that the court decides to give go to the plaintiff, and somewhere around one-third each to the plaintiff's lawyers and the defense lawyers.

Juries have a tendency to take that into account, I'm sure, and build up the amount of damages so that after all the cuts are taken out, the plaintiff himself or herself still has something left.

The CHAIRMAN. Do you think that—well, let's take an example. Let's suppose that a 21-year-old woman, newly married, uses a contraceptive device which renders her sterile for the rest of her life. Do you think that her recovery should include something other than net economic loss, or do you think that she should be limited basically to doctors' bills, hospital bills, and any lost wages that she has incurred?

Secretary BALDRIGE. I think first that it is obviously proper and right to have all economic damages fairly and properly figured from now through whatever the time, the rest of the person's life. When you get into pain and suffering, I do not know how you put a figure on that.

Juries and judges have been all over the map on that. We run into situations where the relatively few very large cases almost swamp the $100,000 and below cases. That is, cases where $100,000 and below is paid for pain and suffering.

You cannot turn back the clock on the kinds of tragic things that cause pain and suffering. In an attempt to put a monetary figure on something that is emotional is where we have gotten into wide variations, and I think we get into trouble. It is not that people do not want to—I mean, that it is not right to have pain and suffering kinds of damages. But what is not right is, after the whole economic damages have been paid, to have tremendous variances in the whole pain and suffering area. That would be our position.

The CHAIRMAN. Do you think it would be advisable for us to allow for some recovery for pain and suffering——

Secretary BALDRIGE. Yes.

The CHAIRMAN [continuing]. In the extraordinary case, but to place an outer limit on what it can be?

Secretary BALDRIGE. Yes. I think we should have damages for pain and suffering and have a limit, because the limit has been the problem.

The CHAIRMAN. How do you respond to the question that the Federal Government has no business being in this area, that tort matters have traditionally been left with the States, that there are some things that are better left to the States, either their judicial system, or if they want to legislate, fine, let them legislate, but this is not an area that Uncle Sam should jump into.

Secretary BALDRIGE. I believe strongly that that question, Senator, was settled 200 years ago. The Articles of Confederation in 1781 simply did not work, and the reason that they did not work was because of the tremendous barriers to interstate commerce that were put up. States could put up their own kinds of barriers at the State line. There were no—there was no interstate commerce then. And it is a coincidence, but 200 years ago today, George Washington wrote John Jay, the Chief Justice, saying that we have to change the Articles of Confederation to allow for solving this problem, and getting into the Constitution.

The biggest change, the biggest addition, there were many additions, but the biggest change in the Articles of Confederation was the fact that the Constitution was based on interstate commerce, and recognize the fact that if the States were going to be ever molded into a nation, we could not have these various barriers.

Now, here we have clearly a State of interstate commerce. We are talking about things that are sold across State lines continually. As I mentioned before, we are talking about products that are manufactured in one State, sold in another State, could be used in any one of the other 48 States or in that same State. Now, that is interstate commerce, and I believe that that question was settled 200 years ago, and that is the reason we have got the Constitution instead of the Articles of Confederation.

The CHAIRMAN. Thank you, Mr. Chairman.

Senator KASTEN. Senator Hollings.

Senator HOLLINGS. It was article X, all powers not delegated under the Constitution to the Federal Government were reserved to the States. That's how they started under the articles, instead of the Articles of Confederation.

Mr. Secretary, when you talk about the free market, I understand that the professions of medicine and law can advertise. I have never seen a doctor advertise or be allowed to advertise that

he could perform a better appendectomy, or a lawyer advertise that he could get you a higher award. They can advertise that they handle property cases or that they handle product liability cases, or doctors can say that they can handle appendectomies or orthopedics, bone injuries, or whatever. The free market—you spoke in dismay about the free market—but I have never seen lawyers compete on the basis you discuss which is that they can get you more money than the next lawyer.

When you, as a client, want me to represent you, then you retain me under a signed agreement. I never heard of a client saying, well, let me understand what it is, and then saying, I'll shop around and see two or three other lawyers or doctors.

You are talking about the real world; I'm talking about the real world.

Where is all of this going on?

Secretary BALDRIGE. Well, let me point out two things, Senator.

Have you seen much variance in the contingency fees that average around 35 percent?

Senator HOLLINGS. No, there is not much variance with respect to doctors.

Secretary BALDRIGE. There is no competition really on that. You do not see somebody coming in and saying I will take 20 percent or maybe doing a few cases, but by and large that contingency fee is a pretty set figure.

Senator HOLLINGS. That is how poor clients are able to be represented. That has proven pretty good, pretty valid, and it has not burdened the system.

Let's get to the costs.

Why do you want to limit contingency fees and not defendants' costs? You want to limit just the plaintiffs' costs when the real cost is defendants'?

If you were fairly picking out the culprit by way of volume or size or amount, you would first go to the real amount, the bigger amount; namely, the defendants' attorneys' fees. Now, after having attacked it, then let's go to the plaintiffs.

Instead, you go to the plaintiffs' contingency fee costs and do not even mention the defendants'.

The fact is, I talked to the bankers this weekend, and they have taken over from the lawyers. I practiced law for quite a few years and never took an hourly fee. I never heard of that kind of thing. Unfortunately now they all have learned it, and they all disassociate themselves from civic work.

The bankers, as a part of their training, now have taken on civic activities. I told the young bankers that they have more of an impact now and an influence on the success and the progress and the future of their communities. I remember in earlier days you joined the Rotary Club, joined the different clubs around, engaged in civic activities so you would be known and have a feel for the community.

But let's get down to costs. It dismays me that the Commerce Committee and not a Judiciary Committee would be looking at fundamental rights. We are just looking at costs. But since we are just looking at costs, why not defendants' costs?

Secretary BALDRIGE. Well, I think there are a couple of major differences, Senator. The defendant has no choice but to defend himself, and I do not pretend to be a lawyer, but that is not usually done on a contingency basis. I mean, he pays the lawyer so much an hour. That is something you can argue about.

The plaintiffs' lawyers have a pretty standard fee. You do not see that change around much.

Senator HOLLINGS. Yes, but why do they not limit it? I look at the hourly rates around this town, and they would wreck me if I had to go and try to get a lawyer and pay him on an hourly rate for my claim. I would thank God for the contingency fee. Do you know, the hourly rate around this village?

Secretary BALDRIGE. Yes, I know, but I do not know the hourly rate, but I am sure it is shocking

Senator HOLLINGS. Oh, come on. You could not afford it, and I could not.

Secretary BALDRIGE. Yes.

Senator HOLLINGS. Well, now we are understanding each other.

Secretary BALDRIGE. No, but Senator, my point is still the same. The plaintiff who has a lawyer come up to him and say let me see what I can get you for this particuar injury, he will charge somewhere in the neighborhood of 35 percent.

Senator HOLLINGS. Usually a third.

Secretary BALDRIGE. That is not necessarily true of the defendant's lawyers.

Senator HOLLINGS. The defendants' costs are all taken care of, you know that.

Secretary BALDRIGE. The defendants have a legal fee that is usually set up on so much an hour.

Now, if we put a cap on the plaintiffs' lawyers fees, the fellows that take it on contingency, you will see that whole market go down. You will see fewer lawyers employed both on the offense and on the defense, and that is what is going to help both American business and the jobs that it creates.

Senator HOLLINGS. You know differently.

Look, the defendants' lawyers have no risk whatsoever. That is why you have a contingency fee.

Do you oppose a contingency fee system in this country?

Secretary BALDRIGE. No.

Senator HOLLINGS. Well, then, why not let it work as it is working in the several States?

Secretary BALDRIGE. Because it has gotten us into trouble. We are in a deep crisis right now. We have got companies going out of business because of this product liability crisis.

Senator HOLLINGS. You think that is the problem? Do you know the best buy on the stock market?

Secretary BALDRIGE. We've got costs going right up like this. I have heard the statement that the insurance companies created the crisis, which is ridiculous. You even have Mayor Koch in New York saying insurance companies are not to blame. He points yet that New York is self-insured, yet the amount in claims it has had to pay out has gone up exponentially in the last 10 years. It is just something going out of control, and it is a system we have got to correct.

Senator HOLLINGS. You say it is ridiculous.

Do you know the best buy—and you are a successful businessman—on the market today is property and casualty insurance.

Have you seen their stocks? Did you see in Time magazine last week that Bell Atlantic wants to get into the property and casualty business, too? They are all trying to get into it.

Secretary BALDRIGE. Well, I know with my usual luck, Senator, I had some of those stocks when they went down in the 1970's. I have not gotten any now.

Senator HOLLINGS. Yes; but that is because they did not charge. When the insurance companies had 20 percent interest rates back there in 1980, 1981, and 1982, they were using that premium money just to invest and make money on. They undercharged for their policies.

Now they are trying to make it all up in 1 year and have created a crisis, and it is not ridiculous. That has been the cause.

Finally, and I will yield because I want to adhere to the chairman's rule here—with respect to overseas—we have got our American standard, and we have a minimum wage. In China, you can get this shirt for 18 cents an hour, because there are 1 billion Chinese and that is the maximum wage over there.

We have got clean air, we have got clean water, we have got product liability, unemployment compensation, Social Security. This is the American standard. In Thailand, where you and I have had a difficulty about the importation of textiles, they have child labor, and if they get injured, they are not compensated. That is not the society in which we live.

Do you want to try to compete with Thailand and all these other countries on product liability?

Secretary BALDRIGE. Senator, the only group of people that the administration proposal would hurt is the Trial Lawyers Association.

Senator HOLLINGS. Trial Lawyers Association.

Secretary BALDRIGE. Yes, sir. It is not going to hurt the defendants or the job creation potential of this country; it is going to help that. But I think the only group that I can see suffering from this proposal which we feel is very reasonable, is there will be less lawyers hired.

Senator HOLLINGS. There will be less cases brought. The individuals will not bother with them, if there is a marginal case—and I can give you many of them. I tried one before I came up here. I had 3 years in it and $27,000 invested. It went all the way up to the circuit court and I never knew whether I would get a nickle, but I believed in the case.

You do not hurt the trial lawyers; you hurt the individuals. Injured parties would be really hurt in this country, and you hurt the safety incentives and practices that we have.

Secretary BALDRIGE. Sir, our proposal says that for the first $100,000 worth of damages, that there is a cap of 25 percent of that that the lawyer taking it on contingency can get. So he gets $25,000 out of the first $100,000.

Then as the award goes up, the fee goes down on a sliding scale.

I think you are right, I think there will be probably less cases brought because there will be less trial lawyers trying to shake the

trees around to see if there are any potential contingency cases that might help them out.

Senator HOLLINGS. Thank you, Mr. Chairman.

Senator KASTEN. Senator Pressler.

Senator PRESSLER. I would like to address the question concerning the joint and several liability issue.

The administration proposal which you and Senator Kasten advocate contains joint and several liability which is very similar to language that I offered in this committee last March. That language replaces joint and several liability with a pure several liability approach except in cases involving concerted action on the part of the defendants.

The new S. 1999 of Senator Danforth's, as I understand it, adopts the several liability approach, but only to the extent that other parties are able to pay. If one defendant for some reason escapes liability, the other defendants will be required to make up the difference.

Now that the administration has had the opportunity to review this approach, what is your reaction to it as an alternative to the relatively pure several liability approach where a defendant is limited to paying for only his share of the responsibility?

Secretary BALDRIGE. Is that S. 1300, Senator?

Senator PRESSLER. Well, S. 1999, I believe. It is the Danforth and the Kasten bills that I am comparing. I am not sure of the bumber.

Secretary BALDRIGE. May I ask General Counsel Riggs to answer that question?

Senator PRESSLER. What is the administration's bill number, the Kasten bill?

Senator KASTEN. It is S. 100, the administration proposal is an amendment in the nature of a substitute to S. 100.

Mr. RIGGS. We have not had a substantial amount of time to review Chairman Danforth's bill. We do have some reservations on the basis——

Senator KASTEN. Doug, would you speak into the microphone, please?

Mr. RIGGS. On the basis of the review that we have given to it, as to your specific question, ours is based upon elimination of the application of the joint and several liability except when you have defendants acting in concert causing the tortious action.

Your particular proposal, I do not think we would have any particular problem with. It probably goes a little beyond what we are suggesting, but I do not think that there would be any substantial difficulty from our point of view.

Senator PRESSLER. Now, as I understand present law, the problem is if somebody is 1 percent responsible for an accident but they are the only deep pocket, they can end up paying the whole thing. This encourages corporations to set up subsidiaries that really do not have any assets.

Under the Chairman's bill, as I understand it, that would basically stand. If someone were judgment proof and they were one-third responsible and the other two were each one-third, then the two would remain responsible for the acts of the third judgment proof defendant. Under the Danforth proposal, as I understand its joint and several liability provision, if you had three defendants

and each was one-third responsible, and one of them was judgment proof, that one would pay nothing, but the other two would share a bigger portion, is that correct?

Mr. RIGGS. We have real difficulty with the concept that a defendant who may be 1 percent responsible nonetheless ends up paying the bill simply because that defendant has the so-called deep pocket. We are very opposed to that concept. I think to the extent that there would be a legislative proposal that would erode that basic principle, I think we would have difficulty with it.

Senator PRESSLER. Let me again emphasize that I think this joint and several liability issue is the teeth, the guts, the very essence of product liability reform on the side that we are talking about. I don't think there is any way we can get around addressing this difficult issue legislatively. I think the administration's bill is closer to what we have to have, and it is closer to my amendment. But I am just concerned that we would be right back in the same old problem with what I am calling the Danforth bill, for lack of a title of it. But the Danforth bill, because once again, now, let's say that you had three defendants, and one was 97 percent responsible and was judgment proof, and the other two were each 1 percent responsible or would have to be 1½ percent responsible, and they had to share the burden, you would be back to the same situation, in my judgment.

Would that be your judgment?

Mr. RIGGS. That would be our judgment

And again, if the defendants have been acting in concert, then clearly the rules should apply. But if they have not been acting in concert and you in fact have a defendant who is only 1 percent responsible, that defendant should not end up paying the bill simply because that defendant has the only means of paying the bill.

Senator PRESSLER. Let me ask you this.

Would the administration support an amendment which would provide that punitive damages would be paid to some public body as a fine? For example, the administration proposal lumps together punitive damages and damages for pain and suffering and sets a $100,000 cap. The S. 1999 limits punitive damages to twice the amount of the compensatory damage award.

Since the theory behind punitive damages is to punish the wrongdoer rather than reward the victim, would it make sense to forget about placing a cap on punitives and instead require that they be paid as some type of public fine or through some specified fund, or would this be unmanageable in an administrative sense?

Another way to deal with the classic case of punitive damages would be to prohibit insuring against them because the punitive damages doctrine says that somebody did something wrong and they should be punished.

But it does not necessarily say that the other fellow should get the money. Maybe we should take the money and pay it to the Treasury of the United States. Or if punitive damages are awarded, like a doctor should not be able to, theoretically, or a lawyer or a Senator or a driver or whoever should not be able to buy insurance for punitive damages because he did something malicious, and he is being punished personally for it.

What about that? Would the administration welcome such an amendment?

Mr. RIGGS. Tomorrow, when Assistant Attorney General Willard and I again have an opportunity to appear before you, I am sure this will be one of the items we will discuss.

Again, the suggestion that paying punitive damage into the Treasury is certainly an idea that has been booted about as a means of handling the punitive damage aspect. Eva though we are not philosophically opposed to that concept, it probably is a concept that would not receive a great deal of support because the feeling being is that if someone has truly engaged in outrageous behavior, conduct that is reckless and grossly negligent and that an individual has suffered because of that, I think that there is a visceral reaction—it may not be an intellectual reaction, but at least a visceral reaction—that the person who has suffered should be entitled to receive those punitive awards.

We believe that the punitive limitation can be handled in any one of a number of different ways. We have just simply proposed one way in the administration's bill.

Senator PRESSLER. What is the Secretary of Commerce's view on this?

Secretary BALDRIGE. Well, I feel about the same as Doug does. There are different ways of doing this and I do not think that we would rule out any particular way at this time.

I think that is an interesting concept you have, but I think you said yourself, Senator, that there may be administrative difficulties. I would like some time to think about that. I think we should keep an open mind on it.

Senator PRESSLER. What about prohibiting the sale of insurance for punitive damages?

Secretary BALDRIGE. You know, to the best of my knowledge we have not discussed that officially in the adminstration. I can give you a personal viewpoint that I would agree with you on that, but that is not an administration position.

I know of no administration position we have yet.

Senator PRESSLER. I would be very curious for a subsequent written response on that if we could get that, because I am very fascinated with this punitive damages thing. The original concept of punitive damages was to punish someone and to make people be safer and more careful. But the very concept, if you can insure against it, now they stack all these punitive damages on and if you are insured there is no punishment involved.

There is a contradiction in terms. The nature of making our society safer, the punitive damages thing really becomes something that you just seek as much as you can to up your take in the lawsuit. So I would very much appreciate your response to these questions for the record.

My last question regards uniform liability standards. How important is it to have some form of uniform liability standard as opposed to the approach taken in the amendment to S. 1999?

I guess that this would probably take us back to our old bill that failed by one vote. That was the old S. 100, I believe. Is that not correct?

Secretary BALDRIGE. The question is how important is to have——

Senator PRESSLER. Yes, to have some type of uniform liability standard nationwide.

Secretary BALDRIGE. Well, we think it is very important. I mentioned a little while ago in answering one of the questions, that if you were running a company today in the United States, you would look over 50 different State laws and you would find a tremendous amount of difference. You would have to kind of base your thinking on the worst case example.

Any predictability there is going to help, that is for sure.

Senator PRESSLER. Thank you very much, Mr. Chairman.

Senator KASTEN. Senator Kassebaum.

Senator KASSEBAUM. Thank you, Mr. Chairman.

My apologies for coming in late, but I did catch the tail end of your statement in which you were listing the growing number of businesses that have stopped manufacturing because of the growth of product liability claims.

We have fought this battle under the leadership of Senator Kasten for several years here in the Commerce Committee. One thing it seems to me is new to a certain extent in the last year or year and a half is the degree of uncertainty about insurance and the concern of almost everyone about affordability and availability of insurance.

I wonder if, as you have analyzed this unpredictability, if you have given any weight to any particular aspects. Is it the joint and several liability, or would it be perhaps, do you think, the question of punitive damages or lack of no-fault-based standards or something else?

Have you given any thought to what is causing this?

Secretary BALDRIGE. Yes, we have, Senator.

I think the major differences that have speeded up lately in the last just few years, but they really started 20, 25 years ago in our whole judicial system on product liability, and at that time there began to be more decisions that went away from a fault-based system. They went more toward the theory that if you were injured somehow, even if it was your own fault, you deserved to get some money from somebody.

Now, that's putting in simple man's language what is more complicated legally. But there was a definite drift of not just 5 years, but say 20 years, away from fault-based liability.

If the Senate and the House agree to legislation that returns us simply to where the laws used to be, returns us to where the thrust is, that liability and fault do have that strong connection, then some of these other things, you see, will begin to get cleared up.

Without that kind of discipline, you get into a bidding contest for how much somebody will get paid in this State as against that State. While I did not mean perhaps to condemn the whole trial bar, let me say that they are part of it because the laws now have been interpreted in so many different ways and there are so many different laws and so many different States, that it is simply too vague.

The underlying intellectual foundation has been the waters have been muddied there, and that allows for more aberrations perhaps than there should be.

Senator KASSEBAUM. So you believe that the lack of fault-based standards are the prime cause perhaps for this unpredictability of insurance at this point?

Secretary BALDRIGE. Yes, because no one knows how much they are going to be liable for and we have seen case after case where people like—I hope I am pronouncing this right—but Bendectin is the only prescription drug available to help pregnant women who suffer from severe nausea. It worked. They had many suits. They won every suit. They still keep getting suits. You tell me why, but they did.

But they could not stand the legal costs, and so now we have no prescription drug in the United States that will help pregnant women who are suffering from severe nausea.

That case is not alone. People running businesses, more smaller than larger, obviously, who cannot come up with the money for the insurance because their insurance costs have gone up from 200 percent to 1,000 percent, simply get out of the market; they cannot keep in it.

But a lot of companies, even if they have never—they have been to court but have always been found not guilty, or innocent of the charges, simply cannot afford to keep on doing that, and their insurance companies, just on the fact that something may happen later, raise their rates so much they cannot keep going.

We see far too many cases of that.

Senator KASSEBAUM. I would guess from your strong statement that you feel that the answer is not the insurance idustry but it really is a question of product liability.

Secretary BALDRIGE. Well, you read and hear statements from I would say a relatively small part of our populace that this is not a crisis. It has just been rigged up by the insurance companies to make more money.

I said that was ridiculous. It is ridiculous on the face of it because if it was a conspiracy by the insurance companies, that conspiracy would have to include the executive branch of the U.S. Government. All large manufacturers, all small manufacturers, would have to get together with the insurance companies. And that clearly is ridiculous on the face of it. I would resent that charge completely.

But what the insurance companies did do in hindsight that was a large error, was in the 1970's with inflation high and interest rates high, they competed by lowering their casualty rates because they felt they could afford to do so because the money they got from the insurance premiums was making 10, 12, 14, 15 percent in investments, so they could actually lose money—they did not want to lose money—but they actually could and in some cases did lose money in their casualty companies, but more than make it up and come out with an overall profit because of the investment.

Now, if we want to get back to that, we can. All we have to do is to pump up the economy by inflationary means, get high inflation, high interest rates again. Nobody wants to do that. So we are living in an era of low interest rates, low inflation, and the insur-

ance companies have no choice if they are going to exist in this business, this part of the business, not to raise their rates.

I think what we have to do as responsible government is to make sure that we have a more uniform national policy on this with some parameters for the States so that people can have a certain constancy of costs and not be fearful of runaway costs in this area.

Senator KASSEBAUM. Thank you.

I would just like to add, Mr. Chairman, that I think this legislation, product liability legislation, is as important as tax reform. I really hope that the 99th Congress can indeed manage to see a constructive piece of legislation passed. We do not have very many days in which to do it, but I happen to share the belief of those who have given it a lot of time and effort because I think it is terribly important.

Thank you.

Senator KASTEN. Thank you, Senator.

Senator Pressler, do you have additional questions?

Senator PRESSLER. I would just agree that I think across the country, with the number of lawsuits, the costs of litigation, and so forth, we are a society with very highly developed rights and we are going to have to give up some of those rights in order to get meaningful relief to this problem. One of those rights is the right to sue almost everybody at a drop of the hat.

But on the other hand, it does make products much more expensive and it is hurting our competitive position and I hope that this time—and I am going to be flexible—we can get a bill reported out to the floor and really do something about it.

Senator KASSEBAUM. Mr. Secretary, we thank you for your testimony and I just want to say a couple of things. First of all, as we have seen this process work its way through, first with S. 44, then with S. 100, then with S. 1999, and now with amendments to S. 100, what we are seeing is a broader and broader coalition developing.

S. 44 was targeted, frankly, at certain kinds of problems with products. Now what we have is a much broader coalition. Some of the specific targets that were in S. 44 are now no longer in the law or in the legislation being proposed, but we are looking at a broad-based group of people that include day care centers and school bus operators; that include small machine tool shops and large corporations; that include nurse midwives and lawyers and doctors; a whole group.

And I think that we have underneath this umbrella basically all of America except for the trial lawyers. I think that all of America is going to speak through the legislative process. Consumer groups are sitting and meeting with us and working with us and have had a major role in the Danforth effort.

Labor groups are meeting with us and working with us. And we have under our umbrella a group of people, I believe, who are going to demand action now.

Senator Kassebaum is correct. This legislation is as important as tax reform and I think that we can be optimistic. We are not trying to roll the clock back 25 or 30 years in terms of a fault-based standard. In effect, what we are doing is trying to codify most existing case law and, in that process, give some predictability and give

some uniformity that will drive these rates down and make product liability insurance and liability insurance affordable.

I think the fact that you are here and the Attorney General tomorrow, along with the White House, is going to help us with keeping everyone under this umbrella, if you will, as we move forward.

We had a vote, a 14-2 vote on a related issue, Risk Retention Act amendments, about a month ago in this committee. We are seeing everyone in this committee concerned, and I think more and more knowledgeable about this problem. So I am optimistic that we are going to have product liability reform pass not only this committee, but the Senate and hopefully the full legislative branch and be signed into law this year, and with your help and with your support we intend to move forward.

Thank you, Mr. Secretary, for your testimony. The record will remain open for 2 weeks so that Senators may come forward with questions which then will be sent to you.

We thank you.

Secretary BALDRIGE. Thank you, Senator.

Senator KASTEN. The hearing is adjourned.

[Whereupon, at 3:14 p.m. the hearing was adjourned.]

PRODUCT LIABILITY REFORM PROPOSALS

MAY 20, 1986

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON THE CONSUMER,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:03 a.m. in room SR-253, Russell Senate Office Building, Hon. Bob Kasten (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR KASTEN

Senator KASTEN. The committee will come to order.

Attorney General Meese, thank you for joining us today for this Senate Commerce Committee hearing on product liability reform. I thank you for your leadership on this issue. Because of your role and the work of the President's Task Force on Tort Reform, I believe that we will succeed this year in passing meaningful product liability legislation.

We have asked some of our witnesses today to bring along a few of their products which are now threatened and which may have to be pulled off the market if the current liability crisis is allowed to escalate. That is what you and I had a chance to look at at the table and what is being displayed on a table to our left.

As you can see, it is really an incredible display, and we went over some of the items. Everything from football helmets to child safety seats to camping lanterns to lifesaving vaccines, everyday products that the American public has come to depend on, come to rely on, are all threatened by the current liability crisis.

Unless Congress acts, I believe that our society will be faced with three basic choices: No. 1, the products will no longer be available; No. 2, they will be available, but at a much higher cost; or No. 3, they would be made only by foreign manufacturers and thousands of American businesses and jobs would be lost.

There is one product which I wanted to point out in particular, and you and I looked at it in particular. It is designed to allow a double amputee and other handicapped individuals to drive their own cars. It has been tested by the Veterans' Administration, been tested by the AAA, received rave reviews from handicapped people across the country, and never had a claim filed against it or even a complaint.

And yet, it was pulled from the market last fall because the small businessman, a Mr. Perry from Virginia, who is in the audience, an engineer who first designed it for his son who is a paraplegic, cannot get insurance. Never had a complaint or a claim. Lloyds

of London refused to renew his insurance policy and no other conventional insurance company will touch it.

I also have a letter from a Wisconsin company that has four new products it cannot put on the market because of the liability insurance crisis. One is a safety device for lawn mowers, a blade-braking system described here, which would only add $2.95 to the cost of the mower and would improve consumer safety across the country.

But they cannot sell it because their insurance costs would increase from $18,000 to $200,000 a year if they manufactured this brake device.

How many innovative, important products like this are being kept off the market in this country today? Today we will hear testimony from researchers at MIT who have developed an artificial skin that can save the lives of thousands of burn victims each year. They cannot get insurance for their innovation.

We cannot wait any longer to act. The crisis is having a chilling effect across this country. Small businesses are going under, as Secretary Baldrige testified yesterday. Job and markets are being lost, and consumers are paying through higher costs.

For that reason, I am pleased to announce new help in our long effort to solve America's liability crisis. Mr. Bob Pritzker, the president and chief executive officer of the Marmon Group, has agreed to serve as chairman of a new advisory committee on product liability reform. This committee will work to focus the attention of the American public on this crisis, on the kind of information that will be presented to our committee today, and to the serious consequences of inaction.

I consider Bob's decision to be a real public service. He is a doer, much admired for his straightforward thinking and hands-on accomplishments. Marmon Group was a $200 million enterprise when he became chief executive just 13 years ago. Today it consists of more than 70 companies with over $3 billion in sales.

Now, as we, in Washington, try to come to grips with product liability, I look forward to working with you, Secretary Baldrige, with others on the committee, Mr. Pritzker, and others. With the support of the administration, the leadership of the chairman of the committee, and the outcry from hundreds of thousands of Americans being affected by this crisis today, I believe that we will succeed in solving the product liability crisis.

Before we begin, I would like to ask the chairman, Chairman Danforth, if he has an opening statement.

The CHAIRMAN. I do not, Mr. Chairman.

Senator KASTEN. Senator Hollings.

OPENING STATEMENT BY SENATOR HOLLINGS

Senator HOLLINGS. Well, you want me to testify now for 10 minutes, too?

I have seen lynch parties before, General Meese, and I am rather surprised to see you leading it. You started off at the State level supporting Reagan federalism. I enjoyed being appointed a part of the Laxalt or Reagan federalism commission. What we were trying to do was to transfer the responsibilities back to the State level.

Tort liability actions for wrongful doing have always been at the State level. I question the premise of this Federal bill to begin with. But otherwise, if it is a problem, it could be solved and is being solved in your State of California. The California Legislature is not lethargic. They have got many bills, they pass some.

They passed some restrictions and controls. And what nonplusses this particular Senator, other than the politics of the lynch party, is the full court press of Lloyd's of London and the foreign reinsurers, the insurance industry, to manufacture the perception that somehow you cannot get insurance for anything.

The market is going to take care of it momentarily. It is having a tough time. It is not just product liability insurance. It is doctors, lawyers, little league ball clubs, and everything else in the world with respect to liability insurance.

However, the insurance market cycle is beginning to turn again. And now you want to federalize tort liability. You want to do away in some measure with the jury system, as I see it. That same jury elected us as Senators and resulted in your being here as an Attorney General, and there is some questionable judgment about both of us. But it works and it has worked over the past 200 years. So it is a fine business. Let the party continue.

While we misunderstand the true greatness of this country and the safety that we do have, we do not have any problem about keeping articles off the market. This is the most innovative country and marketeering country that you have ever seen.

And we can easily list the safety incentives practices, and safety procedures on behalf of the consuming public that have emanated as a result of product liability lawsuits. So I am not going to belabor it.

We have come to hear you. But I want to listen to you closely. I want to understand your basis for the finding all of a sudden of a crisis in either tort or product liability State law. Why do you look for a Federal solution rather than a State solution when you are constantly leading the other parade down the other road. Now all of a sudden you are joining them and are saying we are going to federalize tort law because the States are doing an inadequate job.

So I will be glad to hear from you on that score.

Senator KASTEN. Thank you, Senator.

Mr. Attorney General, we look forward to your testimony. I might say that also at the table before you is one of the leaders of product liability legislation, Senator Mitch McConnell. It is my understanding that Senator McConnell has agreed to have you precede him, and we very much appreciate the fact that Mitch is joining us today. We look forward to your testimony.

STATEMENT OF HON. EDWIN MEESE, ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, ACCOMPANIED BY RICHARD K. WILLARD, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION; AND DOUG RIGGS, GENERAL COUNSEL, DEPARTMENT OF COMMERCE

Attorney General MEESE. Thank you, Mr. Chairman.

I would also like to express my appreciation to Senator McConnell for the courtesy of allowing me to go forward so that I can meet a certain schedule commitment this morning.

I might also mention that with me at the table is Rich Willard, the Assistant Attorney General in charge of the Civil Division of the Department of Justice, and Doug Riggs, the General Counsel of the Department of Commerce, who will be here throughout the hearing and will be prepared to answer any questions you may have. They are able to discuss in more depth as to the Report of the Tort Policy Working Group and are prepared to discuss and answer questions about the proposed legislation.

I would also like to thank Senator McConnell for his support for the efforts on this subject and for his counsel and advice on the presentation of the matters that are before the committee today.

I consider it an honor to appear today to speak in support of your bill, Senator Kasten, the substitute amendment to S. 100, the Product Liability Reform Act of 1986. I appreciate the opportunity to appear here before this committee.

In the last year, the problems that have faced our civil justice system have increased at a frightening pace. Willard later on will expand on the findings of our Tort Policy Working Group in this regard. Theories of tort liability are expanding beyond any idea of what has been traditional tort law, and the awards to plaintiffs have skyrocketed.

These factors, especially in the product liability area, have helped to cause what I think anyone would agree is an explosion in tort liability litigation. The result has been a crisis in the availability and affordability of liability insurance, as you mentioned, Mr. Chairman, in the course of your remarks earlier.

This crisis severely threatens the economy by reducing the availability of goods and services to the American consumer, while at the same time increasing prices dramatically. The very existence of whole industries and tens of thousands of jobs are at risk.

As you know, Mr. Chairman and members of the committee, the administration has been actively involved in trying to find the cause of the insurance crisis and in proposing sound and workable solutions to the problem. Last fall, I created the Tort Policy Working Group, which is chaired by Assistant Attorney General Rich Willard who accompanies me today.

This interagency task force examined all the aspects of the liability insurance crisis, and in February of this year issued a report with findings and recommendations for reform. The Working Group found that, although other factors have contributed to the crisis, the major and fundamental cause is the explosion of tort liability in our courts. More specifically, the Working Group found four problem areas in tort law that needed to be addressed.

The first area of concern is the movement toward no-fault liability, which increasingly results in companies and individuals being found liable even in the absence of any wrongdoing whatsoever on their part.

The second problem is the undermining of causation through a variety of questionable practices and doctrines that shift liability to so-called deep pocket defendants, even though they did not cause

the underlying injury or had only a limited or tangential involvement.

The third is the explosive growth in the damages awarded in tort lawsuits, particularly with regard to noneconomic awards, such as pain and suffering or punitive damages.

The final problem area is the excessive transaction costs of the tort system, in which virtually two-thirds of every dollar that is paid out through the system is actually lost to attorney fees and litigation expenses, rather than used to compensate the victim of the particular tort.

On the basis of these problems, I think it is clear that there is a need for reform of our tort system. The public now recognizes that excessive jury verdicts and the escalating insurance rates have to be paid by someone, and that someone is us, either as consumers or as taxpayers.

Last month, after the President approved the findings of the Tort Policy Working Group which had been unanimously recommended to the President by the Domestic Policy Council, Secretary Baldrige and I on behalf of the President sent to the Congress for your consideration three pieces of legislation designed to address the Federal aspects of the tort problem.

In response to Senator Hollings' question, regarding the Federal Government's role in tort reform, I must say there are many aspects to the tort liability problem and I certainly agree with Senator Hollings that the vast majority of the tort liability problem is a State problem. We do not attempt to address—nor do we feel it appropriate for Federal legislation to address—the vast majority of tort law. Indeed, some of conclusions that were reached by the Tort Working Group are based in part on some of the aggressive and very favorable reforms being made in those States, which have moved ahead of the Federal Government in this regard.

However, after long and very careful consideration, it became evident that tort liability risks associated with product liability have actually resulted in a barrier to interstate commerce that could only be handled at the Federal level. For this reason our proposals address areas of Federal concern but leave the majority of the Federal tort liability problems to the States, as it has traditionally been.

We do believe, however, that there are principles enunciated in the report of the Working Group and encompassed in the legislation now before the Congress that would provide valuable examples for emulation by the various States in correcting their own tort liability situations.

Therefore, one of the most important parts of our legislative package which addresses the truly national problems associated with the flow of goods through interstate commerce is the Product Liability Reform Act of 1986, which Senator Kasten has offered as a substitute to Senate bill 100.

The provisions of the three bills that we have proposed are based on the recommendations of the Tort Policy Working Group and are strongly supported by the administration. We feel that these efforts are just a beginning and should be followed, and we hope they will be followed, by similar undertakings at the State level.

The Product Liability Reform Act of 1986 contains provisions that will:

Require that liability be based on fault;

Limit the application of the doctrine of joint liability to those situations where the defendants have acted in concert;

Place a cap of $100,000 on the amount of noneconomic damages, damages which are generally known under such titles as pain and suffering, mental anguish, or punitive damages;

The bill includes a provision for future economic damages to be paid in periodic installments;

It provides for the modification of collateral compensation doctrines to eliminate double recoveries by the plaintiffs;

It encourages the States to develop and use alternative dispute resolution mechanisms that will help alleviate burgeoning caseloads in the court and allow injured parties to receive a greater share of any award in a more timely fashion;

And finally, it would alleviate the excessive transaction costs of our tort system by placing some reasonable limits on the contingency fees charged by attorneys.

Mr. Chairman, S. 100 as amended by your proposed amendment will assist those American businesses, particularly small businesses, that are unable to obtain reasonably affordable insurance because of the high costs of the current liability system.

We believe that this bill, along with the two other measures which the administration has submitted, the Government Contractor Liability Reform Act of 1986 and the Federal Tort Claims Reform Act of 1986, will begin to correct the Federal aspects of the worst abuses of our present liability system.

The Product Liability Reform Act of 1986, unlike some earlier proposals, does not totally preempt or supersede State legislation in this area, but rather provides specific modifications in only those areas that conflict with the specified reforms.

Enactment of this bill will return our civil liability doctrines to fair and fault-based standards designed to compensate an injured party. It will also provide an extraordinarily beneficial impact, not only for the business community, particularly for small businesses, but more importantly for consumers.

I would like to thank you, Senator Kasten, for your continued leadership in this area; Senator McConnell, for your valuable assistance; and Mr. Pritzker for now providing additional support from the consumer and small business community. Your contribution in the area of product liability reform helps to show our strong commitment to the meaningful reforms that are set out in the substitute amendment.

Thank you, Mr. Chairman. That concludes my testimony. Mr. Willard and Mr. Riggs, following Senator McConnell's testimony, will be prepared to assist this committee with any questions you may have.

Senator KASTEN. Thank you very much.

The Attorney General has a scheduling problem. Ed, I do not know. Do you want to leave right this moment or reply to a couple of quick questions?

Attorney General MEESE. If I could ask the indulgence of the committee, I would appreciate the opportunity to leave now, but

Mr. Willard and Mr. Riggs are fully prepared to respond on the details of the report and the legislation.

Senator HOLLINGS. I have got a lot of questions to ask if we have time.

Senator KASTEN. There are some questions that a number of members of the committee have, but we will address those questions to Mr. Willard and to others.

Attorney General MEESE. Thank you very much. And let me just say that if there are any additional questions that you would like a particular answer from me, I would be happy to submit those answers in writing.

The CHAIRMAN. I have just one question, just a very general one. Do you view the administration's bill as the answer handed down from the administration on tablets of stone to the very complex problem of product liability reform? Or instead, do you view it as one of the alternatives that this committee should consider in putting together legislation which we hope would garner a majority of support in the Congress?

Attorney General MEESE. Senator, I have a certain reluctance to deal in tablets of stone because they have a habit of breaking, and I think that we feel that these reforms are good reforms. I think that these proposals have been very carefully thought out.

But I think, as in other legislation, we would like to work with the committee, and particularly with you, Mr. Chairman, to see if we cannot arrive at a package. But I certainly would commend the proposals that we have today, that have been submitted by Senator Kasten.

The CHAIRMAN. They have received and will continue to receive very careful analysis. But we have been working on product liability reform for a considerable period of time, and there are a lot of people with a variety of ideas, and the hope is to put together a bill that will pass the Congress.

Attorney General MEESE. Well, that is our hope, and we hope that this will be a significant contribution to it. Thank you.

Senator KASTEN. I believe it will be.

Thank you very much, Mr. Attorney General.

The next witness is the Senator from Kentucky, the Honorable Mitch McConnell, who has been a leader in the product liability effort. And we are very, very pleased, Mitch, to have you here and look forward to your testimony.

STATEMENT OF HON. MITCH McCONNELL, U.S. SENATOR FROM KENTUCKY

Senator MCCONNELL. Thank you, Mr. Chairman. I have a statement which I would like to have put in the record if I may, and then it seems to me appropriate to extemporaneously sum up what my own views are on this particular subject.

First of all, I want to commend you, Mr. Chairman, for your bill, and Senator Danforth, the chairman of the full committee, for his work in this particular area. I do, I think, represent a somewhat different point of view from that expressed by the Attorney General and others on this subject.

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It is my own view that this area of tort reform—and I want to broaden the subject beyond simply product liability to tort law across the board, negligence, malpractice, products liability, tort law in general. It is my own view that it is not at all inappropriate for the Federal Government to act in this particular area.

Over the years that we have ignored concepts of federalism when we wanted to and used them when we wanted to avoid doing something. In my own view, there have to be some parameters, some limits around the damage awards in this country in tort law, or the crisis is going to persist.

The liability insurance crisis is what has brought it to our attention, and the question is whether we are going to act in some kind of comprehensive manner to bring some predictability to the system. In the absence of that, I think the liability crisis will continue.

I have introduced at the administration's request two of their bills, their 2440 dealing with tort claims against the Federal Government, and 2441 dealing with the contractors with the Federal Government.

I am in general agreement with what the administration is trying to do, except that I think it is entirely appropriate for the Federal Government to intervene and provide some parameters for recovery, whether it is in pain and suffering, whether it is in punitive damages, whether it is providing for periodic payments, whether it is providing some restriction on contingency fees, alteration of the collateral source rule, modification of joint and several liability, or doing something about frivolous lawsuits, across the board.

I think it an entirely appropriate subject for the Federal Government to draw some parameters. And I think that when we are dealing with only a small part of the problem, the products liability problem, we do not really treat the overall dilemma that is before the country.

So even though I know Senator Kasten's bill is just on products, even though I know Senator Danforth's bill is just on products, and even though I know the administration seems to waive concepts of federalism only as it relates to products, in my own judgment if it is appropriate to preempt State law in the field of products it is also appropriate to preempt State law when it comes to the awarding of damages in tort law across the board.

S. 2129, dealing with risk retention, I know is a bill that you already reported out of this committee. That will be on the floor I assume some time this year. While I have no problem with the risk retention legislation, those who retain the risk will find the same problem as those who are currently involved in spreading the risk, the insurance companies.

They will find that when you look out at the litigation system today, it is very difficult to determine what your risks are. So the problems in writing that risk or retaining that risk are going to be enormous.

I know that this committee is not likely to report a broad, comprehensive tort reform bill. It is probably more likely to be the subject of judiciary legislation. But I hope you will keep an open mind to the possibility of more comprehensive reform across the board.

And at whatever time this issue comes to the floor of the Senate, there will be those of us who will argue that we should be establishing some parameters for recovery across the board in tort law throughout the country, notwithstanding what Senator Hollings has indicated, that in the past this has been largely a matter left entirely to the States. In my judgment, these parameters are appropriate.

And so, with that overview, I think I will depart and let you get on to the other witnesses here. I want to thank all of you for your interest in this most important subject. Those of us on the Judiciary Committee will be involved in it, too, and we will all be discussing the various options on the floor of the Senate when that time arrives.

Thank you, Mr. Chairman.

Senator KASTEN. Mitch, thank you very much. And I just want to say on behalf of the committee, we look forward to working with you.

And there is a jurisdiction question here with regard to the Judiciary Committee, also a jurisdictional question with regard to the Labor Committee. We are going to work our way through this whole set. But thank you for your effort, for your leadership, and for the work that you are doing. We look forward to working with you.

Senator MCCONNELL. I might say, Bob, I might say the danger here is that too many cooks will spoil the broth. You know, those of us who are in favor of doing something, need to get together at some point, and I hope we are moving in that direction.

Thanks a lot.

Senator KASTEN. I believe that we are.

We thank you very much.

[The statement follows:]

STATEMENT OF HON. MITCH MCCONNELL, U.S. SENATOR FROM MAINE

Mr. Chairman, I want to commend you and the members of your Committee for your leadership in the area of product liability reform. This is an area that has come to be one of the most vexing problems facing us today. I thank you for this opportunity to testify before you today.

Before I address the problem directly, or any of the various proposals to deal with it, let me say how pleased I am that we finally have the basis for a common approach to the problem of product liability, liability insurance and tort reform. The legislation recently introduced by Senator Kasten as an amendment to S. 100 is conceptually similar to the legislation I introduced earlier this year in the Judiciary Committee. I am encouraged by this development, and am hopeful that we can work in our respective committees toward a solution that is truly a consensus, and one that is truly fair, just and effective.

Mr. Chairman, there is essentially no argument today that we face anything other than a problem of crisis proportions in the product liability, tort law and liability insurance fields. It is a crisis that hits everyone, from the homeowner, to the working mother, to the owner of a small business, and to the largest corporation.

In my view, it is a crisis that stems in large part from the unconstrained expansion of tort liability in the United States over the past 25 years. Hardly a day goes by that we do not hear or read of the dramatic increase in the number of lawsuits filed, of another huge punitive award, or of another small business, child care center, or municipal corporation that has had its insurance cancelled out from under it. Those businesses and corporations that are able to retain their insurance are often met with increases in premium costs of 100 percent, 200 percent or more.

Why are insurance rates increasing so dramatically? Why are the courthouses so crowded, despite the addition of over 100 federal judges in the last 8 years? Because, in large part, everyone is suing everyone, and most are getting big money.

Something is clearly wrong when the number of product liability cases filed in federal court increases 758% in a ten year period, as it did between 1974 and 1984. I do not believe that this remarkable development is the result of a sudden drop in the quality of products manufactured and sold in America today. And I doubt that it is the result of a sudden change in the adequacy of warning labels placed by manufacturers.

Similarly, something is clearly wrong when the number of malpractice cases per 100 physicians doubles in the same time span. Reacting to facts like these, no less a jurist than Chief Justice Warren Burger has commented that "there has been a litigation explosion during this generation", with "remedies for personal wrongs that once were considered the responsibility of institutions other than the courts . . . now boldly asserted as legal entitlements."

Some, including the National Center for State Courts, have suggested recently that there has been no real increase in litigation. But while there may be some question about the number of cases filed in state courts, no one can seriously dispute that the number of serious cases is dramatically higher than ten years ago. Without a doubt, our present civil justice system promotes litigation, almost for litigation's sake. What is most disturbing about this state of affairs is that so little good comes from so much litigation. Indeed, this crisis will most likely reserve its harshest consequences for American consumers.

Mr. Chairman, trends like those we have seen in the field of tort law simply cannot be permitted to go unattended, and I cite all this to make the point that the tort law, a good bit of which is simply product liability law, has gone unchecked and uncontrolled for too long. If you are in the risk-spreading business, and the insurance companies are in just that, and you look at what is happening in America today, it is hard to know how to spread your risks. With the court system today, and the tort law doctrines that it applies, insurance companies simply cannot know how to spread the risks they set out to insure.

Consequently, I think the only thing that will really bring some order back to the liability insurance system is order in the tort system. As you know, I have repeatedly brought this crisis to the attention of the Senate, and have chaired two hearings for the Judiciary Committee this session on just this issue.

In addition, I have introduced three bills in this session that will, in my judgment, take us a long way back to order in the tort system, and with it, to reasonableness in the liability insurance market. On February 5, I introduced the Litigation Abuse Reform Act, S. 2046. I believe it helps chart a course back to a sensible balance between free and unfettered resort to the courts and recognition of the need for a more pragmatic, responsible approach for dealing with civil disputes.

S. 2046 seeks to impose rational restrictions on the award of damages in Federal courts, and to impart a significant degree of predictability to the liability a defendant faces. It does this by putting a cap of $100,000 on the award of noneconomic damages, or "pain and suffering" awards. These are awards that are inherently unpredictable, and limited only by the whim of the jury. Importantly, this limitation will not—I repeat, will not—deprive any injured party of the first nickel in actual, economic damages, such as past or future medical expenses, or loss of earnings.

In addition, S. 2046 would require periodic payments of awards of damages greater than $100,000, on a schedule approved by the court. It would eliminate the collateral source rule, requiring that damage awards be reduced by the amount of any other payment, such as insurance or worker's compensation, that a plaintiff has received as a result of his or her injury. These benefits, on top of the award to actual damages, are a windfall to the plaintiff. Though it may once have been important to exclude such benefits from the computation, in order to deter negligent conduct, that time has long since passed.

The bill would also clarify the standard to be used for the award of punitive damages, and provide that such awards are to be paid to the court. Punitive damages were never intended to compensate the plaintiff, and their punitive effect will be just as great if paid to the court or some other appropriate body, while removing the incentive for lawyers to pursue large punitive awards.

There are two other major provisions of the bill. One will limit the amount of contingency fees that an attorney may obtain in a case, based upon the amount of the recovery. There is no point in watching an ever growing portion of the awards in tort cases go to lawyers, many of whom have become fabulously wealthy, part of what the ABA trumpeted recently on the cover of its Journal as part of the new elite plaintiffs' bar. The other provision would clarify the standards for holding lawyers who file pleadings without a good faith belief in the substance of them liable for costs, including attorney fees. It would also create a new sanction against lawyers who initiate any civil action without a reasonable belief that there is good

ground for recovery of the relief requested, or merely to force a monetary settlement. The bill would hold such attorneys responsible for treble costs, including the attorney fees necessary to resist the action.

I note that your latest draft product liability recognizes that there is a serious need to introduce disincentives to the filing of litigation. In addition to specific penalties based on the length of the delay in the ultimate resolution, your draft bill incorporates a provision for holding attorneys liable for excessive costs that is similar to my own proposal. Again, I am pleased that we finally have the basis for a common approach to the problem before us.

On Tuesday of this week I introduced S. 2440, the Federal Tort Claims Reform Act, and S. 2441, the Government Contractors Liability Reform Act. These bills, which are very similar to my earlier legislation, were drafted by the Reagan Administration following the recommendations of the Administration's Tort Policy Working Group. In addition to many of the provisions found in S. 2046, both of these bills propose a return to a fault-based standard of imposing liability, as well as a general elimination of the doctrine of joint and several liability. I believe each of these provisions is an important reform that goes to the heart of the issues before this Subcommittee today.

The substantive reforms proposed in each of these bills are similar in most respect to those found in Senator Kasten's amendment. Indeed, the amendment he has put before you was drafted by the Administration, along with S. 2440 and S. 2441. Consequently, they are nearly identical. All three are very similar to S. 2046, which I introduced in February.

I believe these bills provide fruitful avenues. While I have not come to any final judgment with respect to the new draft substitute to S. 1999, that appears to be another possible course to pursue. Because of the natural tendency of the legal profession to complicate matters, however, I must say that I would prefer that the Senate adopt as simple a legislative solution as possible.

At the same time, I recognize that the insurance industry is not blameless in connection with the liability crisis. Indeed, a number of suggestions have been made that the industry is in fact chiefly responsible for the crisis. Some have suggested that the trends in jury verdicts, and in the amount of litigation is not out of line with expected increases due to inflation and population gains—in short, that there is no crisis. I agree that the insurance industry itself should be studied, and I have been insisting that representatives of the industry provide me and the Judiciary Committee with concrete documentation for the problems they suggest are making insurance unaffordable or unavailable.

But the fact is that the number of civil cases filed in federal court has increased over 100% in just 10 years, far more than the population. In testimony on S. 2046 before the Judiciary Committee, the Rand Corporation's Institute for Civil Justice reported that in the medical malpractice field, over the past ten years "claim severity increased at almost twice the rate of increase in the Consumer Price Index." These increases are far greater than the general level of price increases. Something is responsible for this pattern, and we need to get to the bottom of it.

I firmly believe that S. 2046, like Senator Kasten's amendment to S. 100 and the bills I introduced on behalf of the Administration, represent important steps toward this goal. Testimony by the Institute for Civil Justice confirms that tort reforms of the kind I have proposed "had important downward effects on settlements, verdicts, and the number of cases pressed to judgment, while tending to increase the number of claims that were dropped without payment."

Those of us who are interested in effecting some real reform need to coalesce around one particular approach to the insurance and liability crisis. In the past, the forces for change have been divided, which only benefits those who oppose change. With the Administration now involved, and with the recent introduction in the Commerce Committee of legislation similar to my own, we may finally be able to overcome the inertia that has been holding us back.

Mr. Chairman, perhaps as well as anyone, you know full well the nature of the problem. I commend your effort to bring about a long term solution to the crisis we have in product liability, liability insurance and tort law in general. I appreciate the opportunity to appear before you today, and look forward to working with you and the other members of the Committee in solving this problem.

Thank you, Mr. Chairman.

Senator KASTEN. Mr. Willard, I have one question and then we will go through in terms of questions to you from the members of the committee.

Several witnesses here today will tell us that there is no tort crisis, only an insurance shortage caused intentionally, some will say, by the insurance industry. Yesterday Secretary Baldrige testified that this was ridiculous.

I know that the Antitrust Division of the Justice Department has recently looked into the insurance industry. What did they find out about the state of competition in the insurance industry, and how do you deal with this question when it comes up, that this is simply an insurance industry problem and has no relation to tort law or increasing settlements?

Mr. WILLARD. Senator, there are problems in the insurance industry and I do not want to pretend that there are not. There may well be a need for some changes in the regulatory approach taken by the States to particular issues in the insurance industry, reserve requirements, ratemaking, and so forth.

But I think that it is not plausible to claim that this entire liability crisis is a hoax manufactured by the insurance industry. Those in the administration who have looked at this problem have not found evidence to support that kind of implausible charge.

And I might indicate that an advisory commission appointed by New York Gov. Mario Cuomo reported in April that they also found no evidence to support that charge. The Antitrust Division found the liability insurance industry was basically very competitive, very competitively structured; that there are thousands of firms in the business, that none of these firms had a commanding share of the market; and that it is unlikely that the premium price increases we've seen are a result of some kind of conspiracy or collusion in the insurance industry.

Rather, they are a product of economic trends in the insurance industry and the underlying and fundamental explosion of tort liability in our civil justice system.

Senator KASTEN. Senator Danforth, would you like to ask any questions of Mr. Willard?

The CHAIRMAN. Not at this moment.

Senator KASTEN. Senator Hollings?

Senator HOLLINGS. Mr. Willard, I am just catching up. Your capacity has been as the Assistant Attorney General in charge of this study, is that it?

Mr. WILLARD. Yes, Senator.

Senator HOLLINGS. And the study is premised on what statistical findings or correlation of statistical information relative to the so-called crisis? Where is that? What group is it?

They had some charts up here. Jury Research Group, is that it? The Jury Verdict Research, is that it?

Mr. WILLARD. Our study, which is printed and I believe has been made available to your committee, has dozens of footnotes and cites to a variety of sources. One of those sources it does cite are statistics from Jury Verdict Research, Inc.

We also cite statistics from the Rand Corp. and from various other studies which are reflected in the report itself.

Senator HOLLINGS. Well, let us take first Jury Verdict Research. You have looked very thoroughly into that, I take it? You headed up this particular study?

Mr. WILLARD. Yes, Senator, I did.

Senator HOLLINGS. And how long did you engage in it?

Mr. WILLARD. The working group was formed in October and our report was issued in February.

Senator HOLLINGS. And looking at the Jury Verdict Research and how they arrived at their particular statistical findings, did you look into its background? How many States did they study, how many cases, and so forth?

Mr. WILLARD. Yes, Senator. There is a footnote in the report that describes the limitations on the methodology used by Jury Verdict Research.

Senator HOLLINGS. That footnote is where, on what page?

Mr. WILLARD. I am trying to find out right now, Senator.

Senator HOLLINGS. It may be on page 39. I do not know.

Mr. WILLARD. That is one of the citations.

Senator HOLLINGS. What is happening is that I travel and I see and I listen, and I made a point to ask each one of our judges about this so-called crisis. They say, what crisis? And I ask them about product liability and the problem, and they say there is nothing unusual about it. I say, well, we are told now that the size of verdicts has risen recently.

I know we are a litigious society. There are many cases. Everybody sues everybody. But that pertains to all aspects of litigation, not just product liability—for example, the Pennzoil suit against Texaco, that is one verdict of $11 billion. So we are now trying to have a Federal solution to oil contract suits, are we? Or do you have a recommendation for the Pennzoil $11 billion verdict?

Mr. WILLARD. No, Senator, I do not.

Senator HOLLINGS. And I do not, either, and I do not think we should right now. And that is a horrible thing, is it not? Right in the State courts, $11 billion.

Where do they really find this? I saw one chart up here and I wanted to look at that. I do not know whose chart it was. But describe your research into one of these study groups, the Jury Verdict Research Group. Tell us about that, Jury Verdict Research, Inc. How do they arrive at their particular conclusion that there was a crisis?

Mr. WILLARD. They did not arrive at a conclusion there is a crisis. They are a reporting service on jury verdicts that has been reporting information they gather for some years.

Senator HOLLINGS. Well, how do they gather it? That is what I am asking.

Mr. WILLARD. They gather it from lawyers who write in and report it to them, from newspaper clippings, from a variety of services.

Senator HOLLINGS. Come on now. You are an Attorney General. You are not going to come up and testify about newspaper clippings.

Mr. WILLARD. Well, Senator, we do not use the Jury Verdict Research, Inc., statistics as absolutely accurate data as to average jury verdicts in any particular year.

Senator HOLLINGS. What do you use, then, as data for absolute jury verdicts or absolute data for jury verdicts?

Mr. WILLARD. We cite to Rand Corp. studies.

Senator HOLLINGS. And you think that is absolute?

Mr. WILLARD. I do not know that any study is absolute, Senator. We cite a variety of studies, all of which corroborate the same kind of trends.

Senator HOLLINGS. No, but I mean, you are an Attorney General and a lawyer, and you and I try cases and we look at the factual background. What is the factual background to give this particular conclusion?

You tell me that they get it from newspaper clippings and people who call in. That is nothing scientific.

Mr. WILLARD. Well, Senator, it is not and we do not cite it for that purpose. We cite it to show trends, as we explain in footnote 33 on pages 35 and 36. We indicate that there are limitations on the use of that particular set of statistics.

However, Jury Verdict Research, Inc, has used the same methodology for a period of years and there is a trend, a very pronounced trend, in their statistics. The same trend is found in statistics reported by the Rand Corp.'s Institute for Civil Justice and other groups which have studied the tort system.

Senator HOLLINGS. But you and I as lawyers would know that to be a trend is hearsay. We are getting more hearsay, there is no doubt about that.

Mr. WILLARD. Well, the methodology of the Rand Corp.'s Institute for Civil Justice is based on examination of comprehensive court records.

Senator HOLLINGS. Did they go to all the court records?

Mr. WILLARD. It is my understanding they did, for the jurisdictions that they studied.

Senator HOLLINGS. How many jurisdictions did they study, and how many are statistically verifiable—I am just trying to get a conclusion on this, Mr. Chairman, because I doubt the thoroughness of both of them.

Mr. WILLARD. Well, I have never heard anyone criticize the methodology of the Rand Corp. in its studies. They obtained complete data from Cook County and San Francisco, as well as data from Los Angeles, and from a number of other jurisdictions. And from this data they plotted trends.

The CHAIRMAN. I would like to interrupt right now, please.

Senator KASTEN. Senator Pressler.

Senator PRESSLER. Thank you, Mr. Chairman. I have some questions.

Let me say that I really have nothing to add in terms of substance to what I said yesterday and at dozens of other product liability hearings. I do want to say that I understand the present plan is to mark this bill up as soon as we can after the Memorial Day recess. And assuming we will be able to address the legitimate issues raised at these hearings, and I see no reason why we cannot, I am prepared to move forward as soon as possible.

I applaud Chairman Danforth and my colleague Senator Kasten's efforts to move this bill to the floor as soon as we come back from recess. The sand is running out of our hourglass if we want to set a Senate vote on the bill in the 99th Congress.

The opponents of this legislation are all too aware of that, and delay will be part of their strategy. I make this point now because I am sure there will be those who will complain that there has not

been enough time to respond to the draft proposal, things are moving too quickly, we do not have enough of this, we have too much of that, et cetera.

But the fact is we have been living with this legislation in one form or another for over 5 years. We have nearly analyzed it to death, and I am certain that the opponents of the bill would like us to continue to do so. We should not allow this to happen.

My single point is to urge swift consideration of this measure, and I hope we do right after the recess.

Let me ask this question of the witnesses. The administration proposal introduced earlier this month by Senator Kasten contains joint and several liability language very similar to that which I offered in this committee last March.

That language replaces joint and several liability with a pure several liability approach, except in cases involving concerted action of the part of the defendants. The new S. 1999 approach adopts the several liability approach, but only to the extent that other parties are able to pay. If one defendant for some reason escapes liability, the other defendants will still be required to make up the difference.

Now that the administration has had the opportunity to review this approach, what is your reaction to it as an alternative to the relatively pure several liability approach, where a defendant is limited to paying for only his share of the responsibility?

Mr. WILLARD. Senator Pressler, there are several things I would observe that are differences in the approaches. For one thing, S. 1999 as I understand would limit the reform to noneconomic damages and not to economic damages, where there still would be a doctrine of joint and several liability.

In addition, the availability of this limitation would be conditioned on the defendant's having made a qualifying offer to settle the case prior to litigation, and that if that kind of qualifying offer has not been made then the limitations would not apply.

Furthermore, as I understand it, even in the case where the liability is reallocated because someone cannot pay, it is only reallocated among defendants and not to a plaintiff that may be substantially at fault for causing the accident. The way the Uniform Comparative Fault Act works——

Senator PRESSLER. Now, how was that again? It is only reallocated——

Mr. WILLARD. Among the defendants—if I could just use some numbers as an example. Suppose you have a plaintiff that is 40 percent at fault and six defendants each 10 percent at fault. If five of the defendants cannot pay, the remaining defendant pays 60 percent of the damages, whereas under an approach, say the Uniform Comparative Fault Act, the shares that cannot be paid are reallocated among the plaintiff as well as the defendant in proportion to their degree of fault.

This example illustrates that there are a number of technical differences in the way S. 1999 treats joint and several liability as opposed to S. 100 as amended. We support the administration's approach as the one that would more fairly and predictably limit the exposure of defendants in product liability suits to the damages caused by their own fault. Further, unlike S. 1999, the administra-

tion's bill would not create complicated litigation for contribution or reassessment of damages among various parties that may be at fault.

Senator PRESSLER. Do you have any comment?

Mr. RIGGS. I concur with Mr. Willard's answer.

Senator PRESSLER. Let me ask this about punitive damages. The administration proposal lumps together punitive damages and damages for pain and suffering and sets a $100,000 cap. The S. 1999 approach limits punitive damages to twice the amount of the compensatory damage award.

Since the theory behind punitive damages is to punish the wrongdoer rather than to reward the victim, would it make sense to forget about placing a cap on punitives and instead require that they be paid into some sort of a public fund, as a public fine payable to the Federal Government? Would this be unmanageable in an administrative sense, or should we just make punitive damages uninsurable?

Mr. WILLARD. Senator Pressler, we looked at that proposal and concluded that it could not be readily managed administratively. The first question you have to face is, if it is paid into the Treasury, what do you do about the attorney's fee? Does the plaintiff's lawyer get to keep the customary one-third to one-half of the amount paid in punitive damages as an attorney's fee?

If so, then it would create the specter of punitive damage litigation without any client there, simply being fueled by lawyers in a search for attorney's fees. On the other hand, if you do not allow an attorney's fee to be paid on punitive damage awards, then it would appear that you create an entirely illusory remedy, a remedy available in theory but with no one having the incentive or the means to pursue it.

We felt for that reason that, while there is a certain theoretical appeal to having punitive damages going to the Treasury, as a practical matter it would be hard to make that kind of system work fairly and it could create even worse abuses than we have now. This is the reason why we created the cap proposal.

As to the insurability issue, we continue to view insurance regulation as being something that is better left to the State level, and thus we are hesitant to create—some precedent for Federal insurance regulation, even when limited to this narrow area.

Senator PRESSLER. My time is up. I may have some more questions when we have a second round.

Senator KASTEN. Senator Ford.

Senator FORD. Thank you, Mr. Chairman.

Just to ask some basic questions and see if my information is correct. I read the other day that basically 90 percent of the product liability claims are settled out of court. Is that correct?

Mr. WILLARD. That sounds about right to me, Senator. I do not think we have any absolute statistics on it, but I think that is about right.

Senator FORD. But your understanding and mine is the same: approximately 90 percent of the cases are settled out of court?

Mr. WILLARD. Something in that neighborhood, Senator.

Senator FORD. And in the 10 percent of the remaining cases, it falls about 50–50, the defendant wins about 50 percent or 5 percent, and the plaintiff will win about 5 percent?

Mr. WILLARD. I think it is roughly accurate, although I do not know whether it would be 60–40 or something else.

Senator FORD. Up here, if you are roughly accurate you are accurate.

Do you have any figures as to the amount of funds that are expended under the 90 percent and the 10 percent?

Mr. WILLARD. I do not have any such figures, Senator.

Senator FORD. You mentioned a sliding scale a few moments ago to Senator Pressler. What is your approach and what is your personal opinion as it relates to limiting counsel's income?

Mr. WILLARD. The legislation provides for a cap on contingency fees, starting at 25 percent of the first $100,000 and going down on a sliding scale to 10 percent of amounts above $300,000.

Senator FORD. I asked you your personal opinion and you said what was in the bill. But is that your personal opinion, what is in the bill?

Mr. WILLARD. Yes, Senator.

Senator FORD. Are you in favor of wage and price controls?

Mr. WILLARD. Not generally, Senator.

Senator FORD. But you are in this case?

Mr. WILLARD. Yes, Senator.

Senator FORD. OK. That is fine. Yes and no is fine. We can keep right on moving.

The Heritage Foundation, I think, has issued a paper stating that the $100,000 limit on noneconomic damages in the administration or Kasten proposal seems unrealistically low, to quote them. They say that the offset, in these proposals which is deducting collateral sources, such as health insurance from the damage award for other forms of compensation, introduces an irrelevant factor into the tort system.

What is your response to the Heritage Foundation's position?

Mr. WILLARD. Well, I have not seen that particular study, but in response to the particular issues, the $100,000 number is obviously a figure that people can disagree about as a matter of judgment. Some states have used different numbers for limiting noneconomic damages. Some States have used $250,000. Maryland for instance recently passed a $350,000 limit.

It is difficult to say whether one number is necessarily better than another. We did conclude, however, that there should be some limit and that these damages should not be left to the unfettered discretion of judges and juries to come up with whatever number they wish, without requiring some kind of legislative judgment as to an appropriate limit.

With regard to the operation of the collateral source rule, the administration bill, unlike S. 1999, does not completely eliminate court awards when there are recoveries from collateral sources. We only propose eliminating awards when there is no right of subrogation being asserted by the collatertal source. The effect would be to eliminate double recoveries to plaintiffs, but would not be to displace currently existing subrogation rights of health insurance carriers, workers compensation carriers, and so forth.

Senator FORD. Tell me your interpretation of pain and suffering and punitive damage? These has to be an interpretation for each and there is a difference. And your bill, or the bill that you are supporting here today, has a limit on both. Others exclude that limit and there are some disincentives for the defendant.

Give me a brief interpretation for nonlawyers. See, I am trying to understand the legalese here. So if you will give me your interpretation briefly of the two.

Mr. WILLARD. Well, the administration bill does not——

Senator FORD. Could you give me—I am asking for a personal interpretation now. You are here as Assistant Attorney General and I would like to have your personal definition of pain and suffering and punitive damages.

Mr. WILLARD. Well, pain and suffering and other kinds of noneconomic damages are those in addition to damages that are awarded for past or future lost income, past or future medical care, rehabilitation costs, and other objectively quantifiable elements of damages.

The courts have a lot of different names for these types of damages. Some courts call it pain and suffering, some call it mental anguish, some call it loss of consortium, some call it loss of enjoyment of life. There are about 18 or 20 different names, and I cannot tell the difference between them as a lawyer. I mean, they all basically add up to being subjective elements of damages. These damages are determined by the judge and jury, not on the basis of objective facts, but on the basis of their interpretation of what additional harm over and above the quantifiable harm has been suffered by a plaintiff.

Punitive damages, on the other hand, are not supposed to compensate a plaintiff for any harm done, but rather are simply to punish a defendant for doing something particularly bad. In that sense punitive damages are not necessarily supposed to be related to the amount of injury suffered by the plaintiff, but are simply an amount that the judge and jury think will punish and deter wrongdoing.

Senator FORD. I see my time is up, Mr. Chairman. Thank you, General.

Senator KASTEN. Senator Gorton.

Senator GORTON. Thank you, Mr. Chairman.

I must confess to being almost unable to question these witnesses, as I have a rather profound disagreement with the point of view they present. So with your indulgence, I am going to take a few minutes to outline some of my own thoughts on this question.

As the chairman well knows, I think sometimes to his regret, my views on this subject have been fluid and developing over the period of the several years during which this subject has been considered. I have every hope that, for a time at least, this is the last hearing which this committee will hold on the issue and that we can report out a bill on the subject early next month.

As we work toward that bill, of course, we have a number of goals which we are attempting to achieve, not all of which are totally consistent with one another. We do want to deal with a very real crisis in liability and insurance and the like.

I join with the witnesses here and with the chairman in expressing my disbelief that what we have here is some kind of plot on the part of insurance companies, which has no focus in reality in the marketplace.

At the same time, we need to do justice. And at the same time, we need to find something for which there is a broad enough consensus that there is a reasonable possibility that legislation will be passed by the Congress and signed by the President, one hopes, during the course of this Congress.

The administration has rather recently jumped into this process with the bill that the distinguished chairman of the subcommittee has introduced. I think it not a surprise to say that the chances that the administration's bill will pass in anything like this form is remote, to say the least.

I also feel that it would destroy at least one goal of liability legislation at the present time, and that is the goal of encouraging the production of safe manufacturers in the United States. It also, of course, would deprive us to a great deal and extent of the benefits, and the very real benefits, of federalism, of having 50 systems which differ from one another, in which experiments in federalism can take place.

I simply have to say that the combination of low caps, of to a large extent the abolition of the rule of joint and several liability, and the elimination of most of the collateral source rule, in combination, you know, will have an impact that I do not think can be judged by anyone, that will be very, very great, that will probably do less for manufacturers than it will to deprive individuals of appropriate rights.

In fact, I regard it as something of a surprise that the Department of Justice, which is so demanding of a literal interpretation of the Constitution, should make such a fundamental attack on the right of jury trial which is expressly granted by the Constitution of the United States.

To say that there are no circumstances under which the loss of a parent or a child or a spouse can be the subject of damages in excess of $100,000 is not justice, Mr. Chairman, but injustice.

I do think, however, that we have made some real progress, and I must say that I believe Senator Danforth's proposal is a considerable step forward in that regard. He has just given me here today a letter from a celebrated academic and guru of his, Professor Calabresi, which states that the goals of this kind of legislation are three in nature:

First, the reduction of the number and severity of accidents;

The second, reducing the societal cost of accidents;

And the third, reducing the cost of administering our treatment of accidents, the administrative costs of the tort system itself.

I agree with every one of those three goals. I think that they are stated correctly and well. I must say, however, that I am not convinced that Chairman Danforth's proposal meets those three goals, and I will have or already have had distributed to the members of the committee today a draft on the subject which is rather similar to the one I made almost a year ago in July 1985.

The differences were attempts to address some of the concerns of Senator Danforth, but they were spectacularly unsuccessful in doing so, apparently, because most of our differences remain.

So I will just outline very briefly where we do differ at this point. First, in my proposal we incorporate the settlement process into the traditional context of litigation. That is to say, the offer to settle on the part of any party should be set forth in the complaint or in the answer or other responsive pleading.

I think that that is a better approach than an entirely separate claim system, which is probably more like a codification of the way in which lawyers and litigants act now than it is something new. If our colleagues in the Senate are to understand the issue as we debate it, we have got to try to keep it as simple as possible.

With all due respect to the chairman of the committee, I found title II of his proposal difficult to follow, even though I have been familiar with the approach for some time. I am bothered by the fact that a defendant under his title II who chooses not to settle on the good faith belief that he, she, or it has a good defense would be subject to an automatic penalty for pursuing that defense.

It also troubles me that the settlement process is only open to product manufacturers and sellers and not to other codefendants. Why should be allow a manufacturer to settle for a lower amount than a city or municipal corporation which may be an indispensable party, but which may be less at fault?

Second, I just simply disagree with any proponent of Federal legislation who thinks that an absolute and necessarily arbitrary on awards for noneconomic loss, even in cases of negligence, can pass the Senate, let alone the Congress, or should pass the Senate and the Congress. In my case, I do have some limits, particularly when we are dealing with strict liability, but now when we are dealing with negligence.

I think we can make a lot of progress without such caps and I do not think we should cause the whole thing to fail because of them.

And finally, Mr. Chairman, I have more on this subject. It does seem to me that the one area on which there should not be major controversy, but apparently still is, between myself and the chairman has to do with various uniform procedural rules.

This seems to me to be by far the least—have the least implications for federalism. Certainly we ought to be able to pass a uniform statute of limitations and a uniform statute of repose. We ought to have uniform venue options, and we ought to have a uniform choice of law.

However attractive we make provisions to settle, we are not going to get a settlement unless we know what law applies to a particular case. And I have included a uniform presumption that claims maintained by foreign citizens arising out of accidents which take place outside of the United States should not be tried here. You know, we have an example of that going on, you know, right now, where a court has ruled that the *Bhopal* case ought to be tried in India and not at our immense expense.

And so I hope when we come to meet here in June—I think that we can in fact pass a bill which will contribute substantially, though maybe not as some members would like, to ameliorating the problem which we face, which would meet the approval of, if

not all the members of the committee, at least the vast majority, two thirds or three quarters, and actually have a chance of passing the Senate and the House, and which also can retain justice in respect to claims, which I find is signally absent from the administration's proposal.

Senator KASTEN. Senator Rockefeller, I believe you were here prior to Senator Riegle. It is my understanding that you might have a brief statement, in addition to some questions. Senator Rockefeller.

Senator ROCKEFELLER. Thank you, Mr. Chairman.

I am not a member of this subcommittee, as you are aware, but I appreciate your forebearance in my being here. I have not completely analyzed Senator Danforth's amendment to S. 1999, but I must say I am greatly encouraged by what I have seen so far in that amendment.

I think it is critical that whatever product liability measure this committee passes balance the consumer's need to be fairly compensated when truly injured and the manufacturer's and the insurer's need to be protected from overzealous and unpredictable jury verdicts.

Balancing these needs is probably going to be a very difficult thing to do, but I think it is doable. It will take sacrifices from everyone. S. 100, which was the product liability bill last year, I felt did not meet that test. I do not think the administration's bill this year meets that test.

Senator Danforth's bill I believe is the best effort, with some alterations, so far that I have seen to balancing these competing interests.

Now, I for myself, Mr. Chairman, have come to believe that we do indeed need Federal legislation to protect the product liability area. I do believe we need that. Senator Danforth's amendment with alterations looks like a good start.

Senator Danforth mentioned in his opening statement that he was willing to be flexible, that he was willing to look at a variety of refinements to his bill. One that particularly is going to be important as far as this Senator is concerned is the one that Senator Gorton has just mentioned, and that is the matter of the cap, the liability cap. I like what you are saying about that and I will be supporting your amendment to Senator Danforth's amendment when that comes along.

There is something else I want to mention, too, Mr. Chairman. Tort reform legislation has been said by some to be the whole answer to the insurance crises that our country is now facing, and I do not believe that tort reform by itself is the answer. I think it could be part of the answer.

But on the other hand, so does imposing a greater degree of accountability on the insurance industry itself have to be part of the answer. There is a magazine called Business Insurance. In the April 7 issue, their headline is entitled "Wanted: Hard Facts. 'It calls for insurers to admit that their recent disastrous financial results were in part due to their own mismanagement.

Then the magazine goes on to say they must contribute hard facts to the tort reform debate, detailing how specific reforms will control the cost of litigation, settlements, and awards. This is im-

portant to me. I think this question of hard facts from the insurance industry is fundamental to this process.

I myself have been working on an amendment to the product liability legislation that will require the monitoring and collecting of hard facts, Mr. Chairman, which I hope will be helpful. But on balance, it strikes me that we are moving in the right direction.

I do not agree with the administration's proposal. I do think that Senator Danforth's approach, combined with some things that Senator Gorton is talking about, could be very important.

Having said that, Mr. Chairman, I have one very specific question that I wanted to ask Attorney General Meese but did not have that opportunity because he left. So I will ask Mr. Willard, who represents him. West Virginia, whether you are aware of it or not, Mr. Willard, is in a state of extraordinary crisis.

Five insurance industries will have canceled as of the next 2 weeks all doctors and all medical professionals 'liability insurance. Seven thousand medical professionals will stop practicing on June 1. Thirty-nine hospitals will close down, public and private, and a variety of other professions are being shut down completely.

There are those of us who would say that the insurance industry is picking on West Virginia to decide whether the industry can get away there with what they might like to get away with on a broader scale nationally. Now, this has been developing for some time.

I wrote Attorney General Meese on April 11, shortly after the insurance companies made their notices of abandonment of West Virginia. West Virginia is not a large and powerful State and is a State that indeed has been and can be picked on by various large interests. Now, I asked the Attorney General if he could determine whether the insurance companies were engaged in any—or violated any civil or criminal laws.

It did not strike me as a complicated letter. I am not a lawyer. I wrote it, I thought, clearly. It was only 1⅓ pages long. And I have heard nothing.

Now, our session of the State legislature is now meeting in emergency session. The regular session is concluded. They have come together for the sheer purpose of trying to bail 7,000 doctors, health professionals, and others out of the most overall crisis that our State has faced, other than our usual 13-percent unemployment.

I would like to know why I have not had a response to this letter, why the Attorney General or you, if you are handling these matters for him, do not consider this to be important; what it is that I should tell to the people of West Virginia, who, within a matter of 2 weeks, are facing no medical coverage, no doctor services, no hospital protection whatsoever, sir.

Mr. WILLARD. I am not, Senator Rockefeller, familiar with what happened to that letter. I assume it went to the Antitrust Division, which would have jurisdiction over that kind of matter.

I do understand this issue is in litigation, that your State attorney general has filed a lawsuit and obtained an injunction against these five insurance companies. And I do not think it would be appropriate to comment on the issues now pending in that litigation, particularly since I am not familiar with all the facts.

I will certainly undertake to find out what happened to the letter and get a response immediately to you.

Senator ROCKEFELLER. I would certainly be grateful.

Senator KASTEN. Senator Riegle.

Senator RIEGLE. Thank you, Mr. Chairman.

I want to generally associate myself with several of the remarks that Senator Gorton made today. Let me just refresh myself, Senator Gorton. Were you the attorney general in your State?

Senator GORTON. I was.

Senator RIEGLE. I am not an attorney and of course have not served as an attorney general. But I think someone who has and who has had the opportunity to look at the justice system from that vantage point, is a valuable resource for us to have on this committee. I do not know that we have had other members of the committee——

Senator GORTON. You have got the chairman of the committee, who was. He was an attorney general.

Senator RIEGLE. I thought there might be one or two others. I am pleased to have you point that out.

But I think having that insight is very useful, because there are a lot of different kinds of case situations that have to be thought about and reconciled in any kind of bill that we produce here. So again, I want to say that several of the reservations you filed, Senator Gorton, run along the lines of my own thinking.

Having said that, I am very disappointed that the Attorney General is not here to answer questions, and there really is no excuse for that. This is a critical issue. Everybody knows that. What Senator Rockefeller has just said makes that clear with respect to the scale of the crisis in West Virginia.

It is a crisis in virtually every State in the country in one form or another. This hearing could be rescheduled at another time. And it really is not sufficient on an issue of this magnitude for the Attorney General to come, make a statement, and then leave and not answer questions. And I expect that he will be asked to come back at a time that is convenient for him, even if inconvenient for us, because it is important that he be here.

This reflects no disrespect on the two of you, but you are not the Attorney General and in fact cannot speak for him as fully as he can speak for himself.

I do not know what the other matter was that took him away, but if it were clear that this was not a workable day for a serious hearing, when everybody else has come from all over the country to be present and be here, then we ought to have rearranged the day.

And if he can come back next week or later this week or whenever he can come back, I think it is essential that he come back. It gives the impression that he is ducking the questions. I do not know whether he is or he is not, but when he is not at the witness table, where he ought to be, we are not able to pursue the questions the way it needs to be pursued.

If this were a minor issue, I would not make the point. This is a major issue and I just do not find it satisfactory. So I am going to save my questions that I have for him until I have the chance to ask him directly.

Senator HOLLINGS. Mr. Chairman, could I ask?

Senator KASTEN. Senator Hollings.

Senator HOLLINGS. The distinguished Senator from Michigan is getting at, and I will ask it, for example, is that there is no mention in your report, Mr. Willard or General Willard, that punitive damages cases are very infrequent. The punitive damages are highly concentrated in intentional tort and business contract cases.

Punitive damages are so rare in other types of cases, they are unreliable as an indicator of trends. You were talking about the trends. And punitive damages are also very likely to be reduced upon appellate review.

Now, you didn't mention that. You see, these are the kind of things we would like to discuss with the Attorney General. The Attorney General comes up here conclusively representing the report as a great finding. So we are trying to intelligently look at that finding and see how the authors arrived at it.

And why did you not mention those things in your particular report?

Mr. WILLARD. Well, Senator, I guess because I do not necessarily agree with the conclusions you have drawn.

Senator HOLLINGS. Well the Rand study discussed these findings. You just put in your report what you agreed with in the Rand study, is that what you are telling me?

Mr. WILLARD. I do not think the Rand studies show that. For example, the Rand studies show that in San Francisco in constant dollars the average punitive damage award in the early seventies was $145,000, in the early eighties it was nearly a million.

A recent Rand Corp. study which we have been briefed on and that has not yet been published, but is forthcoming, found that in San Francisco 14 percent of product liability verdicts and in Los Angeles 15 percent of product liability verdicts resulted in punitive damage awards. That is a very high percentage of cases. Given the state of the law now, in many States I think a plaintiff's lawyer would be guilty of malpractice if he did not routinely put in a punitive damage claim in every product liability case.

Senator HOLLINGS. All right. On malpractice of testimony here as a witness before this committee, let me quote you exactly what the Rand study says on page 10:

> In recent years trends differed markedly between the two jurisdictions.

We were talking about punitive damages.

> In contrast to the situation in Cook County, the number of punitive damage awards had remained stable in San Francisco for the past 15 years.

That is the Rand study, and you have got it going up, up, and away. Now, that is on page 10 of the report.

Mr. WILLARD. Which Rand study is this, Senator?

Senator HOLLINGS. That is the Rand study that you have cited.

Mr. WILLARD. Well, they have done about eight studies.

Senator HOLLINGS. The Institute of Civil Justice of the Rand Corp.

Mr. WILLARD. In what year was the study to which you refer done?

Senator HOLLINGS. Now you are asking me the year and the time and the place. That is what I wanted to ask you. You just said, well, some years, you know how it is, 20 years and some pages.

Mr. WILLARD. Sir, I was simply trying to identify for my own purpose what report you were referring to, because we have been given data from Rand Corp. going through 1984 which show dramatic increases in punitive damage awards, both in the size of the awards as well as in the frequency of the awards. This is especially recent data for the years 1980 to 1984, which was not available when our report was printed, but have since become available.

It may be possible that some of the Rand data from earlier years pointed in the direction you suggest, but more recent data points a different direction. The Rand Corp. found substantial increases in Cook County as well as in San Francisco.

Senator HOLLINGS. They said, which was really a remarkable thing, that in San Franscisco they have not increased at all in 15 years.

Mr. WILLARD. Well, Senator, I think the more recent data shows a different trend.

Senator HOLLINGS. All right. The Rand report is punitive damages: preliminary empirical findings, August 1985. The statement I referred to is on page 10.

Mr. Chairman, let me just say this at this particular point, because I appreciated what Senator Gorton had to say and the reaction, of course, of the Senator from Michigan. As I was told by the majority, we are going to try to mark this bill up June 3. And I said, well, heavens, can we have one hearing, because I had not even seen the bills when I was asked about it.

And now we have another one. Yes, we had one bill introduced on April 30, one on May 12, and now we are told about the strategy of delay. What about the strategy of the bum's rush?

We can look at these bills and try to understand the backgound. You folks have had a year since last year to put in the bills again. I did not delay anything, but the bills were just put in now. It is obvious none of the Senators have complete knowledge of the three particular bills.

We are trying to play catchup ball. I thought I was trying to be helpful to get a few witnesses that I felt would throw some light on the legislation. Now there are 25 witnesses, and they are jammed in all day long.

I would object to the hearings this afternoon, I can tell you that right now.

Senator RIEGLE. Would the Senator from South Carolina yield just briefly? That is, I have another concern as well, and that is as I understand it the tax bill is going to come to the Senate floor, at least our preliminary timetable is, on June 3.

And that is a critical issue as well, and it is one that we are all preparing for. And in terms of whether or not we stick to that schedule and have the markup here on June 3, it seems to me to be a built-in conflict that we ought to try to avoid if we can.

I thank the Senator for yielding.

Senator HOLLINGS. These are important witnesses and I would like to hear them. I do not know how you really go about it, Mr. Chairman, and hear all these witnesses and give full consideration to the background of these legislative provisions.

The Attorney General and the gentleman who makes the report says, I only put in the part that we liked or agreed with from the Rand report.

Mr. WILLARD. Senator, could I add one thing to my earlier answer? In footnote 39 at the bottom of page 42 of our report, we specifically note regarding the Rand study's analysis—that is the earlier study to which we were both referring—that "punitive damage awards in San Francisco showed an increase also of a lesser magnitude than Cook County." So we did note in the report that the statistics for San Francisco were not of the same magnitude as Cook County.

Senator HOLLINGS. But you are using the word "magnitude" for both, whereas the word "stable" should be there for San Francisco. That is how you tilt a report. I used to write reports myself.

Senator KASTEN. The time of the Senator has expired. And I just want to respond, if I can, to the comments. First of all, to the Senator from Michigan, I cannot speak for the chairman of the committee, but I think it is clear to everyone in this room on both sides of the desk that over the past 5½ years there has been a significant effort made in this legislation, and we are going to continue to do it. I think the problem is worse, not better.

In response to the ranking member of the committee, you are right, a significant number of these witnesses were added at your request. It was not our intention when we put this hearing together to have as many witnesses. We in a sense accommodated requests from you to include people, and I might say as we go through the group a significant number that have testified before us, I mean have testified in previous hearings.

We also had a hearing yesterday afternoon with the Secretary of Commerce, because we recognized the time problems today. For any number of reasons, a number of Senators—you and I were both here, but a number of Senators were either unable or unwilling to participate in that.

So we are going to work our way through until 2 o'clock. We will see how we do. It was not my understanding that we would have as many opening statements and other information.

If it is not possible for us to finish today and if we are not able to get a unanimous consent request to go forward today, it would be my intention to ask these people, many of whom have come from all across the country, to simply stay overnight and we would somehow work out a way to begin once more tomorrow morning.

I think it would not be fair to them to ask them to get back on a plane and then come back here next week or whatever. They have come from all over the country, and the interest that we note here and out in the hall I think is clear, that this is of great concern.

So we are going to go through if we can now to the next panel. We will continue to limit Senators to 5 minutes in terms of questions and answers. Hopefully we will be able to move through the next couple of witnesses in a more rapid fashion.

We will see where we are at 1:30 or 2 o'clock. If it is possible to continue the hearings for one more panel by unanimous consent, we will do so. If that turns out to not be possible, we will make an effort to resume the hearing tomorrow morning, maybe at a relatively earlier time, 8:30 or 9, depending on what kind of a consen-

sus we can reach here, to give some of these people the opportunity to keep the schedule that they all have.

Senator FORD. Mr. Chairman, before you do that, I want to add my voice to those who are objecting to considering this legislation on the 2d or 3d of June. I have been trying—the White House just called. They are agreeing with me.

I have tried my best to understand the sliding scale, the 25-percent increase, and why the defendant is charged the 25-percent increase if he denies or will not try to settle. I have gone through all of that. And Senator Gorton has introduced a bill and he makes more sense than both of you, including the Attorney General, the administration, and our chairman.

I think we need some time to meld these bills together if we are going to have a good one. And I just think I agree with the Senator from South Carolina that we are getting the bum's rush. I know delay around here is a good weapon, but we have not seen all the bills yet.

And Senator Gorton has a good background. I think he is honest and reliable. I would like to have an opportunity to look at his legislation. Maybe we can come up with something.

But I have not seen it, you have not seen it, none of us have seen it. And I hope that you will yield on the push for the first week in June to have this marked up and reported out of this committee.

Senator KASTEN. Senator, our task today is simply to work through this witness list, and I hope we will be able to do so. There is a desire on behalf of the chairman of the committee, and I cannot speak for him, to move forward with some kind of a markup as soon as possible, but we will negotiate that——

Senator FORD. But you are not objecting to the push?

Senator KASTEN [continuing]. After we finish the hearing today. Mr. Willard and Mr. Riggs, thank you very much.

Our next panel will be Mr. Baldwin, Mr. Reimers, Mr. Reiff, Mr. Coyne, and Mr. McClean.

As all of you are aware, we are under a time constraint, and I ask that you summarize your statements for roughly 5 minutes with the light system, but I am hopeful that you can summarize. We will begin with Mr. Dana Baldwin, president and chief executive office of Oliver Machinery Co. Mr. Baldwin.

STATEMENTS OF M. DANA BALDWIN II, PRESIDENT AND CHIEF EXECUTIVE OFFICER, OLIVER MACHINERY CO., WOOD MACHINERY MANUFACTURERS OF AMERICA; NIELS J. REIMERS, DIRECTOR, OFFICE OF TECHNOLOGY LICENSING, STANFORD UNIVERSITY, REPRESENTING THE AMERICAN COUNCIL ON EDUCATION, ACCOMPANIED BY JOHN PRESTON, DIRECTOR, OFFICE OF TECHNOLOGY LICENSING, MASSACHUSETTS INSTITUTE OF TECHNOLOGY; JOHN M. REIFF, SENIOR VICE PRESIDENT, LAW AND PERSONNEL, COLEMAN CO., INC.; JAMES K. COYNE, PRESIDENT, AMERICAN TORT REFORM ASSOCIATION; AND LARRY McCLEAN, VICE PRESIDENT, HARD GOODS, RAWLINGS SPORTING GOODS CO., REPRESENTING THE SPORTING GOODS MANUFACTURERS ASSOCIATION

Mr. BALDWIN. Mr. Chairman and members of the subcommittee, my name is M. Dana Baldwin II. I am president of Oliver Machinery Co. of Grand Rapids, MI, and a past president of the Machinery Manufacturers of America, WMMA.

Ten years ago my father, Ralph Baldwin, whom I succeeded as president of both Oliver and WMMA, testified before a U.S. Senate committee and sounded an early warning about the dire implications the then emerging liability crisis posed to this Nation. A resolution must not await another Congress. Now is the time for action. We appreciate the attention and hard work this committee has devoted to the product liability problem. In particular, small businesses are finding it almost impossible to operate under current liability conditions. In our industry, many small manufacturers are unable to obtain, much less afford, product liability insurance coverages. Skyrocketing insurance premiums provide less and less coverage, and the trend toward claims made coverage will make the problem of liability insurance availability even worse. Inordinate damage awards, sky-high premiums, and shrinking insurance coverage are existence-threatening to many small manufacturers. They force us to significantly curtail our operations, and may force us eventually to abandon them. I care deeply about the 150 families who depend upon Oliver for their livelihood. The product liability crisis must be viewed by Congress as a jobs issue. Valued employees have become innocent victims of this crisis. The U.S. trade deficit is already shockingly high, and would get much worse without viable domestic competition to keep it in check. Failure to pass meaningful product liability legislation will only serve to increase the advantage of foreign manufacturers.

Let me summarize some of the points. Some courts permit evidence of subsequent product improvement to be introduced to prove the original product was defective. We want to improve our products to bring them to the highest standards possible under current technology, but we fear that evidence of these changes may be admissible in product liability actions involving our older products.

Machine manufacturers are often faced with product liability lawsuits when they are not at fault. The National Safety Council estimates that 85 percent or more of all industrial accidents are caused by the operator on his employer and are not the fault of the design or manufacture of the machine. The manufacturer is held responsible without regard to the number of years a machine has

been in service, how many owners it has had, how it was installed, maintained, et cetera. We must return to a fault-based standard.

In addition, wood machinery manufacturers should not be liable if an accident occurred because his product was unreasonably misused or altered, nor should a wood machinery manufacturer be liable if a machine contains a danger that is obvious and apparent yet is necessary to proper operation or the machining. A machine that was made decades ago and sold for only $500 may be the subject of a $1 million lawsuit today. A reasonable time limitation must be placed on liability after which a machine is no longer subject to product liability suits. The Danforth bill uses a 25-year statute of repose for capital goods. This provision makes sense, although we would urge a shorter period, 12 years. If a product has performed normally for 12 years, any accident that occurs after that time is unlikely to be due to a defect in its design.

The Danforth bill contains a provision addressing punitive damages, an area of great concern for members of WMMA. Without any reasonable limits, a single punitive damage award could force a small company out of business. We support the reforms in the punitive damages provision of the Danforth bill. There should be proof of willful or gross misconduct in order to allow any punitive damages.

Both the Kasten bill and the Danforth bill address the issue of joint and several liability. It is basically unfair to make a manufacture liable for a claimant's full damages if his responsibility as compared to the responsibility of other persons was small.

In the past 11 years, Oliver Machinery Co. has paid out approximately $4.65 million in total direct cost for product liability insurance, expert witnesses, defense attorney fees, settlements and judgments. Of the total expenditures, approximately 13.2 percent, or about $615,000, went to the injured parties. We support therefore the provision of the Kasten bill setting forth a schedule for attorney's contingency fees. This will ensure that more of the damages awarded actually go to the injured person. We also support the Danforth approach to curb frivolous suits, and would urge this committee to consider in addition that plaintiff and/or counsel be required to pay all defense costs in these circumstances.

I urge this committee to act now in solving the product liability crisis. In all the talk that the United States has become a service-based economy, the continuing vital role of U.S. manufacturing businesses is badly misunderstood. We are critical players, and the U.S. economy would be irreparably damaged if our sector becomes second-rate. American businesses cannot continue to operate in the current legal climate. We need Congress to restore balance to the law so that we are paying damages only when we are at fault. We need to limit the time of our exposure through a reasonable statute of repose. Product liability systems should not be an accident compensation program funded by manufacturers. American manufacturers, particularly small businesses, simply cannot afford to fund such a program. The nation needs product liability reform now. Thank you.

[The statement follows:]

STATEMENT OF M. DANA BALDWIN II, PRESIDENT, OLIVER MACHINERY CO., REPRESENTING THE WOOD MACHINERY MANUFACTURERS OF AMERICA

Mr. Chairman and members of the subcommittee, my name is M. Dana Baldwin II. I am President of the Oliver Machinery Company of Grand Rapids, Michigan and a past President of the Wood Machinery Manufacturers of America (WMMA). Oliver Machinery Company is a moderate sized wood working machinery and metal sawing machinery manufacturer. We are in our 96th year, having been formed in 1890, and we currently employ about 150 people. Our gross sales for 1985 were approximately $11 million, and for all practical purposes, we broke even for the year. WMMA is a trade association comprised of 113 different companies ranging in size from $300 to $400,000 annual volume up to a few companies with sales in the $50 million plus range. A few of those companies are parts of larger conglomerates, but the vast majority of the companies are relatively small operations, family owned, and frankly, feeling very threatened.

Ten years ago, my father, Ralph Baldwin, whom I succeeded as president of both Oliver Machinery Company and WMMA, testified before a U.S. Senate committee about the problems faced by small business in obtaining product liability insurance. He sounded an early warning about the dire implications which the then emerging liability crisis posed to this nation. Now a new generation of business leaders is calling on Congress to address this product liability crisis. The resolution must not await another Congress. Now is the time for action.

We appreciate the attention and hard work this Committee has devoted to the product liability problem. Now, more than ever, the product liability situation is creating tragic consequences for American industry. In particular, small businesses are finding it almost impossible to operate under current liability conditions. In our industry, as in others, many small manufacturers are unable to obtain, much less afford, product liability insurance coverage. Skyrocketing insurance premiums provide less and less coverage, and the trend toward claims-made coverage will make the problem of liability insurance availability even worse. A few years ago, we paid a $100,000 award in a case involving a cut-off saw shipped in 1946. That award, plus the cost of preparing and defending the lawsuit and appeal involving that particular cut-off saw, are equal to the after-tax profits made on the sales of all the cut-off saws made by Oliver Machinery Company in its 96 years of existence.

The impact of excessive damage awards such as this is devastating on my company and other small manufacturers. Inordinate damage awards, sky-high liability insurance premiums, and shrinking insurance coverage are existence-threatening to many small manufacturers. They force us to significantly curtail our operations and may force us eventually to abandon them. I care deeply about the 150 families who depend on Oliver for their livelihood. The product liability crisis must be viewed by Congress as a jobs issue! Valued employees have become the innocent victims of this crisis. But that would be the very result of Congress failing to act now.

We have had to curtail our capital investments in new machinery and equipment. Consequently, we are shackled and frustrated in our battle to remain competitive with foreign manufacturers who are not exposed to the exorbitant liability insurance cost burden that domestic manufacturers face. The U.S. trade deficit is already shockingly high and would get much worse without viable domestic competition to keep it in check. Inaction on product liability legislation will only serve to increase the advantage of foreign manufacturers. We have just shipped two large precision metal sawing machines to two U.S. aerospace companies. To the best of my knowledge, there is no other domestic supplier which could provide comparable equipment. If we could no longer supply these models, where would this country obtain the machinery on which to build the next generation of aircraft and other defense items? Can we afford to be solely dependent on foreign sources for technology and repair parts?

In addition to the high cost of the current product liability system, the basic legal rules themselves have a direct, adverse effect on wood machinery manufacturers.

A manufacturer should not be penalized for improving his products. Some courts permit evidence of a subsequent product improvement to be introduced to prove that the original product was defective. Faced with this possibility, a manufacturer has a dilemma in deciding whether to make improvements to his existing equipment. While we want to improve our products to bring them to the highest standards possible under current technology, we fear that evidence of these changes may be admissible in product liability actions involving our older products. Senator Danforth's Amendment No. 1951 to S. 1999 provides that evidence of subsequent remedial measures shall not be admissible to prove liability. This rule will remove the fear

that this highly prejudicial evidence will be admitted, and will encourage manufacturers to continually improve their products.

One of the most important factors in this whole situation is that machinery manufacturers are often faced with product liability lawsuits when they are not at fault. All too often, injuries are the fault of the individual operator or may be directly traced to faulty maintenance or unauthorized modifications of the machine by the owner. The National Safety Council estimates that 85% or more of all industrial accidents are not the fault of the design or manufacture of the machine, yet the manufacturer is held responsible without regard to the number of years the machine has been in service, how many owners it has had, how it was installed, how it was maintained, etc. We must return to a fault-based standard.

If a wood machine were designed and manufactured in a reasonably safe manner, in light of then existing engineering and technology, the manufacturer should not be subject to liability because the machine does not meet modern expectations many years later. The question of whether a product is "unreasonably dangerous" should be answered by focusing on the state of the art at the time of manufacture, rather than by using hindsight and knowledge not available at that time. It is fundamentally unfair to impose liability on a manufacturer if a product conformed to reasonable standards of safety at the time it was made. This is a concept that should be included in any product liability legislation approved by this Committee.

In addition, a wood machinery manufacturer should not be liable if an accident occurred because his product was unreasonably misused or altered. Nor should a wood machinery manufacturer be held liable if a machine contained a danger that was obvious and apparent. Senator Kasten's amendment No. 1814 to S. 100 addresses these issues.

A machine that was made decades ago and sold for only $500 may be the subject of a $1 million lawsuit today—despite the fact that the machine was operated safely for all those years. Beyond a certain period of time, no machine can be expected to operate perfectly. In most cases involving old machines, an accident occurs not because of any defect in the way it was made, but because it was improperly maintained, or it has been modified or altered in a manner that was never authorized or approved by the manufacturer. A reasonable time limitation must be placed on liability, after which a machine is no longer subject to product liability suits. The Danforth bill uses a 25 year statute of repose for capital goods. This provision makes sense although we would urge a shorter period—12 years. If a product has performed normally for 12 years, any accident that occurs after that time is unlikely to be due to a defect in its design.

The Danforth bill contains a provision addressing punitive damages. This is an area of great concern to members of WMMA. Without any reasonable limits, a single punitive damage award could force a small company out of business. The Danforth bill directs the court, in determining the amount of these damages to award, to consider the total effect of all other punishment imposed on the manufacturer, including other punitive damage awards to which the manufacturer has been or will be subjected. This is an important safeguard against the devastation of virtually wiping-out a small business—which is not a result that the tort system should tolerate. The Danforth bill also limits punitive damages to twice the claimant's compensatory award. This will ensure that the punitive damage award bears some relationship to the damages actually incurred by the claimant. There should be proof of willful or gross misconduct in order to allow any punitive damages.

We support, in addition, the procedural reforms in the punitive damages provision of the Danforth bill. It is important that evidence relating to the appropriate amount of a punishment—namely, evidence of a company's worth—does not impact the jury's decision regarding liability for compensatory damages and liability for punitive damages. The Danforth bill avoids this result by separating these issues. First, the jury determines whether the defendant is liable for compensatory damages. Second, in a separate proceeding the jury determines whether the defendant engaged in conduct manifesting a "conscious, flagrant indifference to the safety of those persons who might be harmed by a product." Third, if the jury determines that punitive damages should be awarded the judge determines the amount of the punishment. This avoids the prejudicial effect on a jury of evidence relevant only to the amount of punitive damages. It is similar to a criminal proceeding in which the jury determines guilt or innocence and the judge determines the sentence.

Both the Kasten bill and the Danforth bill address the issue of joint and several liability. The rule of joint and several liability permits a claimant to recover his or her entire damages from a single person even though that person may have been minimally responsible for the claimant's harm and other persons were primarily responsible. It is basically unfair to make a manufacturer liable for a claimant's full

damages if his responsibility, as compared to the responsibility of other persons, was small. The rule of joint and several liability encourages the targeting of that single manufacturer if he is perceived to have a "deep pocket." Joint and several liability should be limited to its historical bounds, *i.e.*, cases in which the defendant conspired with others to engage in wrongful conduct. Only in such cases is it fair to make the defendant jointly and severally liable for the full damages. This will encourage the claimant to bring all responsible parties before the court and make sure that each pays for its proportionate share of responsibility. The Kasten bill directly addresses this issue. We also support Senator Pressler's efforts in this area.

In the past 11 years Oliver Machinery Company has paid out approximately $4.65 million in total direct costs for product liability insurance, claims service, engineering services, expert witnesses, defense attorney fees, and settlements and judgments. Of that $4.65 million, less than $1.1 million has been paid out in settlements and judgments. Assuming approximately 15% expenses and 33% legal fees to the plaintiff's lawyers, this means that approximately $615,000 actually ended up in the claimants' hands. Of the total expenditures, only 13.2% went to the injured parties. We support, therefore, the provision in the Kasten bill setting forth a schedule for attorneys' contingency fees. This will ensure that more of the damages awarded actually go to the injured person. On a related matter, we support the Danforth approach to curb frivolous suits and would urge this Committee to consider, in addition, that the plaintiff and/or counsel be required to pay all defense costs in these circumstances.

Without going into detail or mentioning all of the provisions in the legislation being considered by this Committee, I would like to state my support for the efforts by both Senators Danforth and Kasten to address the problems in our current product liability system.

I urge this Committee to act now in solving the product liability crisis. In all the talk that the U.S. has become a service-based economy, the continuing, vital role of U.S. manufacturing businesses is badly misunderstood. We are critical players and the U.S. economy would be irrearably damaged if our sector becomes second-rate. American businesses cannot continue to operate in the current legal climate. We need Congress to restore balance to the law, so that we are paying damages in lawsuits only when we are at fault. We need to limit the time of our exposure through a reasonable statute of repose. The product liability system should not be an accident compensation program funded by manufacturers. American manufacturers, particularly small businesses, simply cannot afford to fund such a program. The nation needs product liability reform now.

Thank you.

Senator KASTEN. Mr. Baldwin, thank you very much.

Our next witness is Mr. Reimers, who is the—am I pronouncing that correctly, incidentally?

Mr. REIMERS. Yes, Reimers.

Senator KASTEN. I wasn't sure if it was Reimers or Reimers. Mr. Reimers is the director of the Office of Technology Licensing, Stanford University. He is representing the American Council on Education, accompanied by Mr. John Preston, who is the director of the Office of Technology Licensing, Massachusetts Institute of Technology.

I just might say, in brief introduction, that these gentlemen represent part of this growing group of people who are concerned about the overall question. As we go longer and longer without some kind of understanding on this issue, we are seeing more and more people being affected, and for the first time in the 5½ years that we have had product liability hearings, we now have representatives of the education community, specifically Stanford University and MIT, testifying here.

Mr. Reimers.

Mr. REIMERS. Thank you. Thank you for inviting us——

Senator KASTEN. You might want to put that mike very close to your chin, because it will not project.

Mr. REIMERS. All right. Thank you for inviting us to testify. Our testimonies are very short. John, on my right, and I are the individuals responsible for the technology licensing offices of our respective institutions. In a sense, we act as matchmakers of our universities' research results with industry.

U.S. universities have been a key factor in the development of our position of world leadership in industrial technology. The traditional role of the university has been as a nurturer of imaginative, creative young men and women who later become educated industrial leaders. More recently, universities have been seen as catalysts of innovation that lead to a Route 128, a Silicon Valley, or a Research Triangle Park.

Still more recently, we have seen a substantial increase in the sponsorship of university research by industry and the licensing of technology by industry from universities. These last developments have been encouraged by bipartisan congressional initiatives such as Public Law 96-517. The result has been a climate in which genuine intellectual exchange between industry and academia has become a reality.

These intellectual exchanges become the driving force between innovation and productivity increases that are vital to enable national industrial competitiveness. Unfortunately, recent years have also seen a dramatic escalation in product liability litigation with university endowments being seen as potential attractive targets of such suits. Thus, legal advisers now are recommending that universities not license any U.S. firm which has limited assets or is unable to provide adequate product liability insurance which covers both the licensee and the licensor.

Many small companies are unable to secure such insurance, yet it is exactly these small companies which have been most effective in contributing to technology transfer and job creation. In addition, universities rely heavily on industrial sponsors who support research in the hope of gaining a privileged position in the marketplace via patents or know-how.

Any inability to license such patents and know-how because of product liability issues endangers the university's relationships with such sponsors, and it is ironic that because industry in other countries does not experience the same degree of product liability costs as does U.S. industry, exploitation of U.S. technology by foreign industry is enhanced.

Universities work hard to develop strong relationships with industrial sponsors and licensees. We believe that these relationships are beneficial to the universities, the industrial sector, and the Nation, but these relationships now are threatened by concerns about possible product liability legislation, and we therefore seek legislative help in limiting the reach of such litigation.

One enjoyable aspect of our work is the opportunity to work closely with startup and small companies eager to invest their energies and invest their resources in the development of new products and processes for the public. To not be able to work with such startup and small companies will be a great personal frustration. We support your efforts toward product liability reform that will enable collaborations of our Nation's research laboratories and our Nation's industry.

This concludes our prepared remarks. Thank you.

Senator KASTEN. Mr. Preston, did you have any comments on your own, or are you part of the——

Mr. PRESTON. Let me respond. I did look at the issue of specific cases at MIT where product liability has inhibited the transfer of technology to small companies, and off the top of my head, I can cite at least three examples, some of which have been fairly, you know, profound in terms of the risk-taking by MIT or the individuals involved. As a former entrepreneur and cofounder of a high tech company, I think I understand that you need to have some risk involved in going out and starting a company, but I think that the current environment creates risks that are unacceptably high.

I will cite one example. A few years ago, a professor at MIT in the mechanical engineering department developed a synthetic skin for treating burn patients, and received from the FDA approval to use this skin at Mass General Hospital to treat burn patients, and this was to treat patients only who had a 10- or 20-percent chance of survival, so 80- to 90-percent chance of dying from their burns.

And at the time that that professor sought advice from counsel, and the counsel advised him that without—since the end skin was actually being manufactured in his laboratory, counsel advised him that without some insurance, either in the form of product liability insurance or malpractice insurance, he was exposing himself and his students to potential liability. And rather than inhibit the technology transfer in this case, the professor went to the provost—the then-provost of MIT, who is now the president of MIT—and actually received a special—well, received a letter from MIT saying that MIT, who is self-insured, will cover any liability or any action taken against him or his students, so MIT took a very risky, if you will, approach in an effort to transfer this technology.

Now, since that time, about, I think, 125 or more patients have been treated with this skin. I have a sample of it here, which I can explain if you are interested, but I will avoid delaying the session any longer, and of those, about 120 of them are now alive, and I think I could document that they are alive and in better condition than they would have been using competitive or other techniques for treating this kind of problem.

So, you know, this is a case where MIT took the risk on behalf of its faculty members, but we have other cases where there are small companies taking inventions out of MIT, paying a very high amount for insurance, and MIT is requiring insurance in the licensing process and finding it increasingly difficult to effectively transfer this technology because of it.

Senator KASTEN. I want to complete the panel, but it is my understanding that for the particular product that you have here today, there is now no insurance available. Is that correct?

Mr. PRESTON. This actually is now a success story from our point of view. There was no insurance availale during the initial phases. We have now successfully licensed it to a large company, in this case a large company rather than a small company, and so that company is sufficiently covered. I can cite an example right now where we are licensing to a company technology for delivering drugs, that the company is paying $80,000 for $400,000 worth of

coverage, which is going to be insufficient in the future as they get closer to production.

So, I can cite other examples.

Senator KASTEN. Mr. Preston, I want to get through the whole panel, and I apologize to the members of the committee for even interrupting you this way. Let us go through the panel, and then we will go through the witnesses.

The next testimony is from Mr. John Reiff, senior vice president of the Coleman Co.

Mr. REIFF. Mr. Chairman and members of the committee, I appreciate the opportunity to be here today to discuss these problems that affect our business. Coleman manufacturers a wide range of outdoor recreation, heating, and air conditioning products. Additional information about Coleman I have attached to my written remarks.

Today I would like to discuss the impact of an out-of-control tort system on one Coleman subsidiary. The company is Coast Catamaran Corp., founded in 1967. It was purchased by Coleman in 1976. You may not recognize the corporate name, but many will recognize its products, Hobie Cat sailboats. The Hobie Cat catamaran sailboat has introduced many people to the sport of sailing. It offers exciting performance, yet is inexpensive, durable, and easy to rig and sail. It has enjoyed unprecedented popularity with more than 100,000 units in use today. Unfortunately, it has also become the target of a number of product liability suits. Because of weight and strength characteristics, virtually all sailboats made today, including Hobie Cats, have aluminum masts. Hobie Cat sailboats have been pushed, pulled, carried, sailed, tipped, and towed into electrical powerlines. Some of the lines have been over water, but others have been over launching ramps, in gas stations, over apartment complex parking lots, next to beaches, and in isolated rural areas.

Most of the accidents which have occurred have resulted in very serious injuries or fatalities. These accidents and the suits which follow have continued even though the company has placed very clear warnings on the mast, one of them, frequently included electrical safety articles in its Hobie Cat owners' magazine, twice sent letters warning of hazards of low hanging powerlines to every known electrical utility company in the United States, and provided rewards to consumers who report dangerous powerline.

I brought with me a mast section with the warnings attached. It is over on the table behind the people over there.

Although it seems difficult to believe a product liability suit could result from the use of an aluminum mast on a sailboat, particularly when most all sailboats have aluminum masts, Coast Catamaran has been sued 18 times since 1978. Even more disturbing is that of the six recent cases tried to a verdict, five have resulted in substantial verdicts for plaintiffs, and two have involved awards for punitive damages. There are currently eight additional cases pending trial. Of those eight cases, in four of them the amount of claim is required to be stated in the suit, and in those, the average claim is $12 million. It can be assumed equivalent amounts are sought in the remainder.

The cases which have been tried present a clear picture of the unpredictable nature of the tort system as it presently operates. Our aluminum mast has been held not defective as a matter of law in Georgia. However, in Illinois and California, juries awarded punitive damages in excess of $1 million. Another jury in California found the mast to be not defective. Juries in Idaho and North Carolina rejected demands for millions in punitive damages, yet returned substantial compensatory awards.

The defect theories asserted are that the mast should be made entirely of nonconductive materials, although no one has demonstrated that such a mast can be made, that it should be insulated, that it should be grounded, and that the warning should be different. In one recent case, an expert said that one of the reasons the warnings were defective was because the lightning bolts on the two stickers are different.

What is the impact of this litigation on Coast Catamaran, a business with less than $20 million in annual sales? At current production levels, the products liability cost per boat is about $380. This is almost 10 percent of the product's average retail price of $3,900. In addition to these costs, the company has spent large sums developing a nonconductive mast tip to replace the upper one-third of the aluminum mast.

This mast tip is being installed on new boats, and has been offered free of charge to existing boat owners. So far, less than 2 percent of the owners who have been offered the new mast tip have indicated they want it installed on their boats.

In summary, Coast Caramaran may not survive. At risk are 190 jobs, an important product line for over 400 independent retail dealers, and a loss to consumers of a uniquely enjoyable product. Time does not permit a similar description of the product liability suits involving the well-known Coleman lantern and other products we make. Reform is badly needed.

I thank you.

Senator KASTEN. Thank you very much for your testimony.

Our next witness on this panel is Mr. James Coyne, president of the American Tort Reform Association. Mr. Coyne.

Mr. COYNE. Thank you, Mr. Chairman.

I would, in the interest of saving some time, like to submit my entire testimony for the record and also a list of the members of the American Tort Reform Association. I would also like to congratulate you and the other members of the committee who have taken a position over the past 5 years as leaders in the effort on the Hill to investigate intelligent solutions to the liability crisis.

In fact, when I was a member of the other body I remember distinctly the leadership that you, Mr. Chairman, evidenced several years ago, and I congratulate you for that.

As I was coming to this hearing today I passed the Lincoln Memorial and could not help but be struck by the comment of President Abraham Lincoln more than 120 years ago: The highest duty of every attorney is to discourage litigation.

A few minutes after that a car, a Mercedes stopped in front of me with the license plate ISUE4U. Obviously President Lincoln wasn't driving the Mercedes.

What we see today is, if I may paraphrase the former dean of the Stanford Law School, litigation pollution. It is a disease that has affected our country dramatically over the past 20 years. It is not part of our Bill of Rights. It is not part of our Constitution. These changes in our tort system have evolved dramatically in just the past 25 years and have led to a runaway explosion of litigation that all Americans are abhorred by.

The American Tort Reform Association, of course, is an alliance of those Americans. It is only 5 months old, but already the American Tort Reform Association lists nearly 300 of the major trade associations in this country as its members. I would just like to read for you the steering committee of the American Tort Reform Association. It includes the Air Transport Association, the American Association of Community and Junior Colleges, the American Business Conference, the American Consulting Engineers Council, the American Hospital Association, the American Institute of Architects, the American Institute of Certified Public Accountants, the American Legislative Exchange Council, the American Medical Association, the American Recreation Coalition, the American Society of Association Executives, the American Trucking Association, Associated Builders & Contractors, Bechtel Corp. the Boy Scouts of America, the Business Roundtable, the Food Marketing Institute, the General Aviation Manfacturers Association, Mechanical Contractors Association, the National Association of Child Care Management, National Association of Homebuilders, the National Association of Realtors, the National Association of Wholesale Distributors, the National Federation of Independent Businesses, the National Paint & Coatings Association, the National School Boards Association, the Pharmaceutical Manufacturers Association, Sears Roebuck, and the Small Business Legislative Council.

Of course, on the other side we have the American Trial Lawyers Association.

The question is whether the American public, allied together, can effectively defeat the self interests of the Trial Lawyers of America.

ATRA, of course, is a public body, public interest group, representing effectively the consumers in this crisis, the people who pay for ATLA's salaries. We believe that these consumers ought to be listened to. We cannot continue to have this runaway litigation. A recent bumper sticker in California said: "Support your local lawyer, send your son to medical school."

Today, virtually any for-profit or not-for-profit organization is effectively doing the same thing, one way or another, supporting their local plaintiff's attorney. This is not, however, a partisan issue. It is a public issue.

You heard earlier today from a Republican Attorney General of the United States. Our counsel at ATRA is a former Democratic Attorney General of the United States, Benjamin Civiletti. Both of them agree in the need for tort reform. Several important Democratic Governors across the country in recent months have supported important tort reform proposals at the State level.

We look, of course, at all of this as evidence that something must be done. The cause, of course, is the litigation explosion. There are others, of course, who are at fault as well. But do not believe,

please, the distorted data and material that are being presented at great cost by the Trial Lawyers of America.

I recently received a fundraising letter from the president of one of the Trial Lawyers Association chapters saying that he was raising $300,000 apiece from the trial lawyers in just one State to oppose tort reform. Your bills that are under consideration before this committee are the important first step in effecting tort reform, probably because of the leadership that you exercised many years ago.

But we have got to not rest on our laurels. Many other elements of tort reform are needed. The liability crisis must be addressed, but do not believe the data which might be paraphrased as lie, l-i-e, ability that is being presented by many of the opponents.

You have read the statistics. You have heard the debate. Now is the time, of course, for courage on your part. The trial lawyers are a potent and effective lobbying force, but I think the American public deserves that this body and the committees that make it up have the courage to stand up to them.

Thank you very much.

[The statement follows:]

STATEMENT OF JAMES K. COYNE, PRESIDENT, AMERICAN TORT REFORM ASSOCIATION

Mr. Chairman, members of the Consumer Subcommittee, my name is James Coyne. I appear before you today as President of the newly formed American Tort Reform Association (ATRA). ATRA is a broad based coalition organized solely to address the issues of liability, availability of insurance and reform of the tort system. It is comprised of over 300 of the nation's leading national and state organizations ranging from The Business Roundtable and Boy Scouts of America to the Small Business Legislative Council and the American Trucking Association.

As Commerce Secretary Malcolm Baldrige stated at an April 30 product liability press conference:

"Our product liability crisis has a very detrimental effect on U.S. productivity and competitiveness. As the costs associated with our product liability system, including the costs of liability insurance climb upward, those costs will be reflected in higher unit prices which will make U.S. products less attractive in both domestic and foreign markets. As companies are faced with the prospect of paying high sums of money in product liability suits or for product liability insurance, we will see more of them discontinuing their products."

ATRA could not agree more with Secretary Baldrige's observations. And, it is not only products which are affected, but basic services as well.

We feel that the liability crisis can only be solved with basic tort reform, the only answer to curing what has become an insidious national disease. It would be easy to "fingerpoint" at one another as "the one" to blame, but there is no real answer within such an approach. The fact of the matter is that all segments of our society must work together to cure this disease called "litigation pollution". Indeed, during 1984, our state courts nationally were clogged with 16.6 million civil suits—compared to Japan's 160,000. We must affect fundamental changes in not only tort law, but the public's attitude toward tort litigation.

The American civil justice system, which our Chief of Justice Burger has for many years decried, is in danger of seriously damaging our way of life.

Our system of civil justice is based on a fair hearing of the evidence and redressing of wrongs. Today its become an investigation of who has insurance and inventing a legal theory to show why the insured defendent should pay. Individuals who are injured by the fault of others should have access to the legal system and should be fairly and quickly compensated, but those goals are not being met because of the unpredictable, expensive and timeconsuming "lottery" which is the tort system today. We have moved from remedy based on negligence or fault to compensation based on alleged injury, the more unlikely and outrageous the better.

Moreover, the high costs created by the tort system are being passed on directly or indirectly to all our nation's citizens. As a result of spiraling costs, access to

needed services and activities is being restricted or is in danger of being restricted as insurance becomes prohibitively expensive or is eliminated.

Risk for local governments, independent businesses, professionals providing essential services was something computed far down in the budget and covered by insurance. Now risk is top of the agenda at city council meetings, board rooms, and universities. It no longer is a minor budget item for insurance, but is often not only expensive, but increasingly unavailable.

More importantly, it has put many people in the "risk" business, people who must make the decision, "Do I dare continue to serve on this board of directors, this school board or town council, this athletic or recreation league?" For many the answer is no. They have decided the risk isn't worth it. This is particularly true of small businesses, volunteer groups, local governments, and special purpose districts. That decision costs us all; not in dollars, but in the quality of our communities.

Let us look for a minute at some of the areas by which consumers are affected by liability:

Commerce: The cost of liability insurance was estimated to be $9.1 billion in 1985—60% more than in 1983. The cost of all legal services in 1983 was over $33 billion—a 58% increase in real terms in ten years. These costs are passed on to all of us in form of increased costs for goods and services.

Transportation: In cities and towns across the nation, thousands of commuters depend upon public transit as their primary vehicle to get to work. The American Public Transit Association, the country's largest organization of transit operators reports that premiums for those companies able to obtain insurance this year have gone up 500% to 1000% and sometimes more. As a result, some local transit systems have had to suspend operations.

Tourism: The vacation season will shortly be upon us. The threat of international terrorism will cause more Americans than usual to "stay home", vacationing in the U.S. rather than abroad. But consider this: The owner of two amusement parks in Wildwood, New Jersey—a popular seaside resort—is faced this year with an increase in his insurance premiums from $89,000 to $400,000. Ski resort operators are facing premium increases ranging to 500 percent in one year. Should this trend continue, what should have been a major, albeit sadly ironic, boost to the U.S. tourism industry, which employs thousands of workers and services, will continue to curtail its activities.

For others who choose to take the risk, it changes the way they make the decisions that matter. Rather than innovation, new products, new services, new markets, public and private managers have to worry about, "What's the chance I'll get sued?" In this stifling climate of anxiety over unknown risk, our economic growth, perhaps even our spirit of adventure and pioneering, will be reduced.

The great strides in transportation, communications, buildings, energy generation, pollution control and even historic preservation are all dependent on engineering, most of it done by independent professional firms. Yet what do we find today?

Liability insurance is today nowhere available for hazardous waste removal engineering nor for the design of the rehabilition of federal buildings, when asbestos is present. Firms performing structural engineering necessary for construction of dams, wastewater treatment plants, bridges, as well as public buildings, experienced an average increase in premiums of 54% in 1985.

In addition to my post as ATRA's president, I also serve as Executive Vice President of the American Consulting Engineers Council, one of ATRA's founding members. The Council undertook last year a professional liability survey which showed that design/engineering firms pay more in premiums—often for less insurance—with a higher deductible. While the percentage of firms operating uninsured was up only slightly to 13% from 11.7%, nearly a third of small firms were "going bare". And, as of January, 1986, A/E firms which engage in any type of environmentally-related work find themselves with a "pollution exclusion" in their insurance policies—assuming they are able to obtain or afford any kind of insurance at ail.

Most of the 1986 policy renewals among ATRA's members for liability insurance show increases from 50% to 900%. Furthermore, almost everyone's deductibles are being doubled and limits of liability are being reduced. The consequences for hazardous waste cleanup engineers, as described above, as well as asbestos removal contractors, small towns and communities which you represent, colleges and universities, new drug companies and thousands more, are they have to "go bare"—no one will write insurance at any price. They're facing bankruptcy, liquidation or the deadly game of litigation roulette. Talking about a society which cannot educate or immunize its children is not "painting horror stories" to make one's point. It is taking a realistic look at the dangerous situation we face today.

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What we have in public, as well as private and commercial projects, is a crisis in tort liability. This crisis extends to every facet of business life.

What is the crisis of our tort system? For that matter, what is tort law? Mr. Chairman, you well understand the system as an attorney. For those of you who are not legal scholars, tort law is the law of civil wrongs other than the breach of contract. It's the framework for most of the lawsuits in America today.

A little historical perspective is needed to understand how we got to where we are.

There are two broad areas of the law: criminal and civil. Tort law falls under the civil category and includes everything from slip and fall cases to automobile accidents to libel suits.

The rules in tort law center on what kinds of injuries can be compensated and what has to be proved to win the lawsuit. We inherited these rules from English common law. In the past, changes in these rules evoled slowly, largely from court decisions, not from statutes.

In America, we have 50 different state court systems and hundreds of federal courts that must interpret and apply these laws. There is often a difference between the rule in one place and the rule applied in another. Overall, however, most court decisions on tort law have followed the same general trend.

Surprisingly enough, even with all the minor adjustments and additions made through nearly 200 years of American court decisions, the balance struck by English common law remained essentially the same from the early 1800's until the 1960's.

With limited exception, a person suing could recover only if he proved that the defendant was at fault—that the defendant's negligence caused the injury. If the plaintiff—the person bringing the lawsuit—was the primary cause of his own injury through negligence or deliberate conduct, he could not recover.

Plaintiffs could usually get damages for intangible pain and suffering only if there was an accompanying physical injury. And punitive damages—punishment awards over and above compensation for injury—were available only for truly outrageous conduct. In other words, tort laws were defined in such a manner that one only obtained redress for cases of true negligence, not for the personal risks of everyday life.

The tort system we have today—only 25 years later—is vastly different. Our generation has overturned 200 years of legal tradition.

To illustrate recent changes, let's look at just a few of the important decisions of the last 25 years in California. I have chosen California because its lead has often been followed by other states.

In 1961, California rejected the common law doctrine of sovereign immunity, which for centuries had protected cities and states from lawsuits. In fiscal 1984, California cities—that's California taxpayers—paid out more than $19 million in claims, up from $5 million just three years ago.

In 1962, the concept of fault was tossed aside in the area of product liability. Now, an injured person doesn't have to prove any negligence—just that the injury might have been prevented by a different product design. That's how you get lawsuits against telephone booth manufacturers for not making their product crashproof.

In 1968, the California Supreme Court changed the standard of care owed by landowners, extending the duty of "utmost care" to even criminal trespassers.

In 1975, California replaced the doctrine of "contributory negligence" with "comparative negligence". Comparative negligence allows an injured party to recover if he is partly—or even primarily—at fault for an accident.

Not only has legal doctrine been substantially altered, the dollar value of awards has ballooned. The tort system today has more million dollar winners than a state lottery. You may think that the high awards you read about are aberrations, but in 1984 the average product liability verdict was over a million dollars. Data from federal courts show product liability suits have increased 758% in the last ten years. The average medical malpractice award was $950,000.

Courts today also have become more liberal in awarding punitive damages. Recently, an insurance company disputed the proper settlement amount with a couple whose car was rear-ended. The insurance company offered $4,500; the couple believed they were entitled to $17,000. They sued, claiming the insurance company had failed to settle their claim in good faith, and recovered $7.4 million in punitive damages. Regardless of who was right or wrong, the punitive damages awarded were totally out of proportion to the claim at hand.

And courts in many states are handing out extraordinary awards even where there is no physical injury, just the mental trauma caused by watching an injury happen to someone else, or the worry brought on by fear that an injury might occur in the future.

Huge damage awards are a recent phenomenon. The first million-dollar tort verdict was awarded in 1961. In 1983 alone, this country settled 360 cases for $1 million or more. By comparison, in the entire judicial history of Canada, there have been only six $1 million tort cases—and three of these cases, applying Canadian law, were decided by U.S. courts. No other country pays these huge amounts.

The financial cost of our tort reparations system is staggering: In 1984, the tort system was estimated to cost 37 times as much as it did in 1950. Commercial liability insurers alone spent $2.9 billion defending suits in 1983; and legal defense costs had risen to 25 cents per premium dollar, compared with 5 cents per dollar in the 1950's.

Let us turn now to what is being done about the liability crisis. ATRA is committed to lowering liability premiums, litigation expenses, and reducing the frequency of unjust and irrational lawsuits. We have a two-pronged agenda. First, we have built a broad-based bipartisan public organization with the resources and capabilities to demonstrate to our nation's policymakers what has to be done. Many lawmakers hear only the voice of the Association of Trial Lawyers of America (ATLA). In fact, the multimillion-dollar war chest they've raised to oppose tort reform demonstrates how their own self-interest is leading them to ignore their duty to the public.

Second, we have carried this effort to 50 state capitals this year. Tort reform will not come only by the efforts inside Washington's beltway. During 1985, 42 states considered 283 pieces of legislation addressing liability and insurance reform, with an average of six pieces of legislation each. New York State alone considered 35 separate bills. Of the total 283 bills considered nationwide, 47 have become law. Twenty-one measures related to civil justice reform, 17 created new law, such as establishing insurance coverage requirements, and 9 mandated administrative change. We have actively supported these state efforts, especially with the help of the American Legislative Exchange Council, the leading organization of state legislators concerned about tort reform.

Third, we organized a 1986 White House conference on liability issues.

National leadership at the Administration and Congressional levels has been forthcoming. Assistant Attorney General Willard calls tort reform his #1 priority. Attorney General Meese created a special Working Group within the Domestic Council which has already introduced three tort reform proposals, all of which are supported by ATRA. We are particularly grateful to you, Senator Kasten, for introducing the Administration's Product Liability Reform Act, as well as your early attention to this issue on S. 100.

We think that the three administration bills are a good start. Sections related to specific professions or remedies have been introduced elsewhere and can be included to perfect these bills, but this is the Committee where the leadership focus should be.

We are encouraged by the fact Congress is holding hearings. Yet, the battle has just begun. Much has to be done. The public needs to get a better understanding of how the arcane subject of tort law so severely affects their lives and their livelihood.

We are confident of the success of our effort because of the broad public and private support and interest we have already received. We are confident that our friends in Congress will continue to be interested and committed to join us in this effort.

What is the solution? We can't look to the lawyers to solve the problem. Abraham Lincoln, a lawyer himself, once said that the highest duty of an attorney was to discourage litigation. While I certainly support his view, it is a tough standard. It's like asking doctors to discourage medicine or ad agencies to discourage advertising. In fact, just the opposite is happening as lawyers increasingly advertise for tort clients.

We can't look to insurance companies to solve the problem. As middlemen, insurers are in the business of spreading risks in a society, not picking up the tab for them. Insurance is unusual in that it must price its product to cover the cost of lawsuits today and many years into the future. As long as the courts define the rules, the policies will be competitively priced to reflect those rules. If the liabilities are undefined, the insurance cannot, or should not, be written.

Finally, we can't look to the courts alone to solve the problem. Courts are focused institutions which decide narrow cases involving the parties before them. Only occasionally do they see repercussions beyond the immediate case. If they did, they would probably not have set many of these recent precedents.

It took 25 years of case-made changes in doctrine to create our most litigious society in the world; but we do not have 25 years to correct it. The stakes are simply too high. So, if we can't look to the lawyers, and we can't look to the insurance companies, and we can't look to the courts to solve the problem, who can we look to?

The answer lies with us as citizens and with the legislature. But the legislature will not act until the voters make their voices known. Everyone must get involved because everyone is paying the price—municipalities, businesses, citizens and even the trial lawyers, who are themselves having trouble getting liability insurance.

It is time for all of us to step back and readdress some basic questions:

Is fault still important?

Where do we draw the line on defining and assigning liability?

Should there be limits on financial damages?

When does ease of suit cripple the productive elements of society?

These questions—and other—are big, important and complex. They must be thoroughly analyzed and debated at the local, state and national levels by everybody, not just the experts. We must understand the issues. We must talk to one another. We must involve our legislators. Only then will the system begin to change.

The following are some solutions we might consider:

1. Put limits on liability.

Limit pain and suffering awards, particularly when there's no physical injury or when the injury occurred to someone else.

Reduce size of awards where the impact of taxes, expenses and collateral sources are significant.

2. Punitive damages. The original justification for punitive damages was to deter outrageous behavior, willful and wanton misconduct. In recent years, this good standard has been diluted to the point of capriciousness.

3. Revive comparative negligence. This doctrine allows plaintiffs to recover large damages even if they are more responsible for the injury than the defendant. That's what allows people who throw themselves in front of subway trains to recover hundreds of thousands of dollars from the taxpayers. It should be possible for judges to dismiss lawsuits at an early stage if the plaintiffs are clearly responsible.

4. Eliminate joint and several liability. The defendant should be financially responsible only for his own fault in the incident, and not for someone else's fault if that person can't pay.

5. Limit the contingency fee system. This encourages frivolous lawsuits and provides an irresistible incentive to extend the line on defining liability.

6. Create a mechanism for mandatory, non-binding arbitration of smaller claims, which make up the bulk of tort cases. If a plaintiff then carries his case on to the courts, he should pay defense costs if he does not prevail.

Someone once said that people get the kind of government they deserve.

I think we deserve a system that is predictable. A system that provides prompt, just and full compensation to injured victims at a reasonable cost. A system that does not make each of us a potential target for lawsuits arising from someone else's accidents. A system, in other words, that does not outrage our common sense notions of justice.

Thank you for the opportunity to present our views today. I will be happy to answer any questions.

Senator KASTEN. Thank you. Our next witness is Mr. Larry McClain, who is with the Rawlings Sporting Good Co.

Mr. McClain.

Mr. MCCLAIN. Thank you very much, Senator Kasten.

I work for Rawlings Sporting Goods Co. We are manufacturers of baseball, softball, and football equipment, along with athletic clothing. I also represent the Sporting Goods Manufacturers Association today, which represents 80 percent of the U.S. producers of athletic clothing, footwear, and sporting goods equipment.

The problem we are facing, and we are very sincere about it, is an endangered species called sports, and I mean that. I have a football helmet back there on that table. Ten years ago you had 18 manufacturers. Today you have three, and in a few years I do not think you will have those three, the way it is going.

I attended a helmet lawsuit myself a few years ago, on behalf of Rawlings. Six weeks of having a lawyer pointing at me talking about all the carnage we were doing on the field. The problem it came down to is the trial was for $5.2 million. The jury awarded $5.8 million. There was nothing wrong with the helmet. The boy

broke his neck. We did not warn him he could break his neck; however, the father played on a football team in the late 1950's where a boy was paralyzed. That was the first problem.

Then second, a question was placed to the boy, but was sustained, though, that would he play football again knowing all these things that could possibly happen to him. He said absolutely.

Back in the 1960's you had a risk assumption. You went out to play ball, and you knew you could get hurt. Today you do not have that, and that is a major problem for us, these lawsuits. It is not just football. There was a case recently where a softball player slid into second base, broke his ankle, and got $40,000 because nobody told him the base would not move.

We have been told, make a base that moves. That is fine. You come around second base and you try to cut the corner tight. If you have a base that moves on you, you could pop an ankle or a knee very easily. So we do not know what to do there.

There are all kinds of things. I just heard we have an aluminum bat suit coming at us after 12 years when the industry did a big recall on aluminum bats. That was 12 years ago. We made a big effort to fix the problem. Now, here it is 12 years later, and we have a lawsuit on this same bat. It was still hanging out there someplace.

It is all of us, not just the manufacturers. It is the school districts and the leagues. We all have the same basic problems. The consumer pays for it in the end, as was alluded to earlier. He pays the price for the product, so everybody loses on this program.

The bills that have been introduced, Senator Danforth, Senator Kasten, they are a very good start. We would like to see some other things come along with this. We would like to have risk assumption there, where the player knows the risk. Today he has no risk assumption at all with the way things are set up today.

I lost my place. Just a second. I was rolling there for a moment.

Our main concern is taking care of the kids, really, and that is what we want to do. The Sporting Goods Manufacturers Association wants to set up a national sports rehabilitation foundation, and Rawlings is a big backer of this. You probably have 30 to 40 kids who suffer catastrophic injuries every year in different sports, and we want to set up something where those kids are taken care of for the rest of their lives. We are very concerned about that.

We are concerned about the consequences of what can happen if you lose. Top manufacturers do a lot of research and development on products. For instance, what is going to happen when football helmets disappear from this country? Here come a lot of football helmets from overseas or some backyard garages with no good safety standards on them.

I have a boy 6 years old. I have visions that he could be a Heisman Trophy winner if he wants to play football. I am not putting him out there when I think he could possibly get killed in an inferior product down the road. That is not going to happen. I am very worried about that.

As I said, we just want some relief. We are bleeding out there right now, contrary to what some people may think. People talk about insurance. Insurance policies out there now for schools are forthcoming. We are not sure how real they are. Are they good?

Are they going to pay off or take off and go overseas with the money? We do not know. There are a lot of questions there.

In summary, I think we have two choices: to stop the game; or to change the rules, the way we are playing it. Thank you very much for your time.

[The statement follows:]

STATEMENT OF LARRY MCCLAIN, VICE PRESIDENT-HARD GOODS RAWLINGS SPORTING GOODS CO., ON BEHALF OF THE SPORTING GOODS MANUFACTURERS ASSOCIATION

EXECUTIVE SUMMARY

The sporting goods industry and entire sports community is in trouble. And the cause of the trouble is the current state of tort law, where fault has been eliminated as a basis of liability. A decade of debate on products liability, catalyzed by the sporting goods industry, has produced enough rhetoric to launch an armada of hot air balloons. The one thing it has not produced is reform. The only change in the problem today, compared to 1976, is that it is deeper, more critical and more costly.

Sporting goods manufacturers, retailers, schools, amateur sports groups, municipalities, and private providers of recreation services are suffering from: (1) a panoply of frivolous suits; (2) extravagant awards for injury predicated on the "deep pocket" theory; (3) insurance that is either unavailable or unaffordable; (4) erosion of contributory negligence and assumption of risk defenses.

The result: (1) U.S. companies, large and small, are dropping product lines or going bare; (2) U.S. jobs are lost or never created; (3) U.S. sporting goods manufacturer's competitive position is being further eroded; (4) less sporting goods product is available to consumers and at higher cost; (5) injured parties are compensated in some states and victimized in others; (6) schools are dropping their sports programs; (7) amateur sports groups are disbanding leagues or hiking dues to where they may be unaffordable to participants; (8) volunteer coaches, refs, and other league officials are refusing their services out of fear of being sued; (9) municipalities are closing or dropping recreational activities; and, (10) private providers of services at campgrounds and marinas, on rivers and at water sports sites, or gymnastics and health clubs are abandoning their services.

For American sports, the two minutes warning is sounding. The time for debate and study is over. Public officials need to stop the bleeding if the U.S. sporting goods industry and amateur sports in America is to survive. We have no more "deep pockets". A runaway tort system, whose primary beneficiaries are the lawyers who have a litigation explosion, is disadvantaging American consumers and bankrupting American industry. Society stands to lose much more than "fun and games" if it is unwilling to accept that sports are action oriented, where the benefits outweigh the inherent risks.

I. BACKGROUND

The composition of the sporting goods industry and amateur sports community

The Sporting Goods Manufacturers Association and its umbrella organizations represent 80 percent of U.S. producers of athletic clothing, footwear and sporting goods equipment. The U.S. sporting goods sector is a $14 billion industry at wholesale and $28 billion at retail. The entire recreational complex is $250 billion, composed of private sector industry segments and functionally interdependent public agencies that are reliant on the availability of product, resources, facilities, investments and expenditures that generate millions of jobs in the production of goods and services.

Not seen in sales or employment numbers are the medical costs saved around the nation, with corresponding increases in employee productivity, which result when millions of Americans pursue sports and recreation activities; nor the quality of life benefits that accrue to society from the availability of sporting goods product, used in the pursuit of leisure-time enjoyment.

Historically, the sporting goods manufacturing industry has been composed of vertical sub-segments whose average sales are in the $1 and $25 million range. Industry profits over the past five years have averaged 3.6 percent.

There are 20 million youth who participate in organized amateur sports activities; 5.5 million who participate in high school interscholastic athletics; 2 million in collegiate athletics; and uncounted millions of adults who plays competitive and lifetime sports. The irony of the present liability crisis is that litigation in athletics, in gen-

eral, is inversely proportional to injury statistics and to technological improvements in product. On a time-risk basis, sports is one of the safest activities in which a person can be involved. In a high contact sport, like football, the fatality rate from direct and indirect causes for high school and college players averages less than .75 for every 100,000 participants, while the fatality rate for the same age group in motor vehicles is 72.5 per 100,000.

While there are fewer and fewer potential plaintiffs, those who are injured are more inclined to sue and juries are more disposed to find fault and award enormous damages. Because of the deep pocket system of products liability, products which have protected millions of athletes in the hundreds of millions of games over the decades are now being labeled defective. Yet 99 percent of the suits against sporting goods manufacturers and third parties are not based on defective product, but on the failure to warn that there is an assumption of risk in playing sports. Sporting goods products are not inherently dangerous; that is the Catch-22. It is the activity and user behavior that create the potential for injury. Each year unconscionable millions of dollars are being extracted from the deep pockets of school districts, equipment manufacturers, doctors and others who are dragged into athletic litigation; and the situation is getting worse.

Change in products/sports liability law and its legal impact on athletics

Twenty-five years ago, this subject would have had little relevance to individuals or corporations involved with athletics. Prior to the mid 1960's, millions of young people enthusiastically participated in and competed in athletics, which involved risks of injury. When the occasional catastrophic injury occurred, no one claimed fault contributed to the accident. Athletic injuries were viewed as infrequent, unfortunate, but inevitable risks which were acceptable when weighed against the benefits of athletic participation.

Early cases made clear distinctions between required athletic activities, such as physical education classes, and those in which students voluntarily participated. Where students were required to participate and injury occurred, courts generally allowed the player to sue and recover when there was evidence of negligent supervision. The court's approach to extracurricular activities in the past was generally based on assumption of risk principals. Assumption of risk simply means that the plaintiff, in advance, has given his consent to relieve the defendant of any obligation toward him, and to take his chances of injury from a known risk. It did not matter if the athlete specifically said or read anything. His or her voluntary participation in an athletic activity was viewed as an implied waiver of the right to later claim negligence in the event of an injury.

Today, sporting goods manufacturers' defense in products liability cases has been eroded. The changes are: (1) the wholesale abolition of contributory negligence across the country and the adoption of comparative negligence in its place; (2) With the adoption of comparative negligence, the traditional barrier to extracurricular athletic injury lawsuits, assumption of risk, was abolished or diluted to a whisper of its former power; and (3) the creation of strict products liability in 1973.

These three changes, combined with the traditional damage doctrine of joint and several liability, have created a nightmare for everyone involved with athletics.

Assumption of risk was a rule of law which completely barred a plaintiff's recovery. This defense was applied in many extracurricular athletic injury cases. In case after case, courts would rule:

"It is important to realize that unlike physical education courses in school, participation in interscholastic activity is a purely voluntary act . . . The plaintiff assumed the risk of injury when he tried out for and played (the sport). Coaches had the right to assume that (players) possess the intelligence and stock of information of a normal young (person). They had the right to assume that he knew of the possibility of injury that comes to an individual . . . when the body clashes to cause bruises, jolts and hard falls. To remove them would end the sport."

Exceptions were carved out when injuries resulted from reckless or deliberate acts or when injuries were exacerbated by negligent actions in dealing with an already injured player. In these cases, neither assumption of risk nor contributory negligence would bar recovery.

Comparative negligence has also opened the courthouse doors for athletic injuries to plaintiffs who under contributory negligence principals would probably have been unable to find a lawyer to take their cases. For example, in California, a gymnastics instructor sued the manufacturer of a mat designed for pole vaulters for injuries he received when he underrotated while attempting a sommersault off a trampoline. He had done the same trick 300–400 times. When he hit the mat head first, he broke his neck and injured his spinal cord. His theory against the mat manufactur-

er was that the mat had not been tested for gymnastic use and that the manufacturer failed to warn him of the dangers knowing someone could be injured trying a sommersault. Absurd? To everyone perhaps except the jury. The gymnastics instructor was awarded $14.7 million.

Comparative negligence largely abolished the defense of assumption of risk. Participants in extracurricular athletics were no longer considered to have assumed the risk of anything. If they could establish fault on the part of anyone else for their injury, coach, athletic administrator, trainer, team physician, state athletic association, school, U.S. Olympic Committee, amateur sport group, private provider or equipment manufacturer, they could obtain a verdict and collect; the only question was how much. With the abolition of traditional defenses, a proliferation of litigation became inevitable.

Since the creation of strict liability in tort, the plaintiff's burden of proving a defect has been eliminated. An injured player's sole liability is to prove he was injured while using the product. Fault becomes irrelevant. An injured player need only have an "expert" testify a product was defective and a jury would then be allowed to decide whether the injured person would collect, and if so, how much. Neither contributory negligence, assumption of risk nor plain stupidity were allowed as defenses. Changes in the law motivated by the trial bar have led jurors to make social policy judgments in the courtroom that are turning the products liability system into a compensation system that not only awards economic damages, but wreaks penal retribution on the defendant, as well.

Only a decade ago, amateur sports groups and their volunteers would not have believed themselves liable for an injury to a player, nor would plaintiffs' attorneys have attempted to prove such an argument. There was no legal precedent, nor was there a "deep pocket." Today, however, courts are taking an activist role in deciding the liabilities of schools, youth sports organizations, municipalities and volunteer sports officials. There has been a profusion of litigation against these groups and individuals that is frivolous, yet exacting a high cost to athletics. Questionable suits are finding their way onto the court dockets. For example:

"In New Jersey, in a men's slow pitch softball league, a catcher, not wearing a catcher's mask, prepares to take a throw from an outfielder. He misses the ball, which hits him in the eye and causes a partial loss of vision. The catcher sues not only the city where the game was played, but the umpire as well. The claim: Since the catcher had no mask, the umpire should have lent the catcher his mask before the game, then called balls and strikes from behind the pitcher. The catcher was awarded $24,000."

Or let's take another: "A 10-year old boy sustained an eye injury when he misjudged a fly ball in the outfield. The manager and league were sued for failure to recognize that the player was a natural infielder and not an outfielder."

And another: "A player, whose father and coach were on the field, was struck by lightening on a relatively clear day. He sued the league for failure to check on atmospheric conditions with the weatherman prior to the practice."

Based upon an inestimable number of frivolous suits and some which are not, it is imperative that the risk factor be re-established in sports. Athletics will always involve risks. In taking those risks, individuals, including participants" parents, must bear their fair share of responsibility. The liability problems confronting school and organized recreational sports are making liability insurance unattainable or at such costs to be unaffordable, and threatening the heart of amateur sports and its volunteers, who will refuse to donate their services if they are continually and unexpectedly exposed to frivolous liability litigation.

II. THE SEVERITY OF THE PROBLEM

Products liability insurance coverage for sporting goods manufacturers is unavailable from the majority of carriers. Where it is, premium increases range from 500 to 1,000 percent, with coverage grossly inadequate. And insurance companies who write primary coverage at exhorbitant rates will not write excess.

The insurance industry has classified the sporting goods business as an industry that has too much exposure and is too high a risk to insure. The result: (1) manufacturers are going bare; (2) others are grossly underinsured and will not be able to pay large damage awards, if called upon to do so; (3) retailers are refusing to buy product; (4) companies are dropping product lines, in some cases, being forced out of business; and (5) promising new technology investments that maximize product safety have been put on hold.

In the case of amateur sports groups, the very fabric of their organized sports programs is threatened.

There has been a sudden exodus of qualified persons serving on boards of directors at all levels. A mega-buck award in the face of severely limited coverage puts volunteers in personal financial jeopardy.

Parents are hesitating to enroll their children in programs do not have liability insurance protection.

Dues increase, necessitated by doubled deductible and premium hikes, are making organized sports programs unaffordable to some participants.

The multiplier effect translates into the potential elimination of youth sports in this country and agency activities such as Scouting, Police Athletic Leagues, and Little Leagues, for over 30 million children nationally.

The Amateur Softball Association, composed of 182,000 teams and 3.5 million participants in 1985, has seen its liability premium go from $7,000 in 1985 to $150,000 this year.

The Soccer Association for Youth, which oversees 4,600 yough soccer teams in 12 states, had a $1 million general liability policy for everyone in the program in 1984, at a cost to the organization of $4,500 per year. In 1985, that same exact coverage cost $22,500 or a 493 percent increase. They anticipate at least a $45,000-50,000 premium for the same coverage in 1986. They had already increased their membership dues 25 percent in each of the past 2 years, and do not believe local clubs can absorb higher costs.

Schools and municipalities are closing their facilities to sports teams, where baseball and football fields alone host as many as 100 games a week. Schools around the country are dropping interscholastic and intramural programs. And liability coverages for other schools are forcing the institutions to make students "pay for play." The elimination of school sports as part and parcel of our educational system is underway. The trial bar's effectiveness in targeting schools as another "deep pocket" is forcing insurance companies to cancel school policies. Following judgments against two schools in excess of $1 million each, one insurance company cancelled the policies of 585 schools.

To come full circle, the conscessionaries who deliver recreational services on our national parklands and waters are finding themselves in a precarious position. Many cannot find liability insurance. White water canoeing and rafting, or horseback riding may no longer be available to those who want to enjoy the beauty of our recreation estate. Professional mountain guides will not be allowed to operate in national forests if they cannot get coverage. There is a good chance insurance costs, or lack of insurance, will force dive store owners to halt or curtail their teaching programs and organized dives. As of July 1, the insurance of one of the major diving certification agencies will no longer cover dives over 60 feet. This would eliminate over half of the instructional dives on shipwrecks on the East Coast. The suspension of these operations will cause the bankruptcy of thousands of small businesses, but more importantly, will lower the safety level of all of these activities for the consumer, since there will be less professional guidance.

Solution

For the sporting goods industry to stay in business as healthy, competitive economic producers, we must have broad-scale tort reform. The present liability system simply does not work. A tremendous amount of money is being chewed up by an inefficient tort system, that could be channeled into new product, sports safety programs, and a more competitive U.S. industry.

Let's review what strict liability in torts has done to a few segments of the sporting goods industry:

Of 18 football helmet manufacturers in 1976, only three remain producing that product line.

In hockey, where American companies pioneered protective equipment product, the only ones now producing helmets, shinguards and chest protectors for the sport are the Czechs, Swedes and Canadians.

There are no more domestic producers of trampolines.

Dive equipment manufacturers are dropping their life support product lines.

Domestic producers of hunting accessories and other outdoor products are cutting back production.

The sport of lacrosse is in severe jeopardy, with only two U.S. manufacturers in the sport, both finding liability insurance unaffordable.

While U.S. producers pay 4.2 percent of sales for product liability insurance and litigation, foreign manufacturers are paying ½ of 1 percent.

The plight of private providers and school and amateur sport groups is no different. Facilities and programs are closing or high risk activities being dropped.

The U.S. Olympic Committee lost its insurance April 30th and is forced with taking the $4 million earned for amateur sports programs from the L.A. Olympics to fund a self-insurance program. The viability of this proposal is uncertain.

The problem of the out-of-control legal system threatens the existence of sports in America. We need to get out of the litigation box and develop a fair tort system that redresses wrongs and is not socially counterproductive. Structurally, we need to eliminate joint and several liability. Caps on non-economic damages of pain and suffering must be effected, and there should be a limitation on punitive damages. Providing for periodic payments of damages (instead of lump-sum) and encouraging use of alternative dispute resolution mechanisms to resolve cases out of court would help to ease the economic burden of litigation proceedings for all parties.

In cases where a plaintiff can be compensated by certain collateral sources, awards should be reduced to prevent a windfall double recovery. And, attorneys' contingency fees should be limited to reasonable amounts on a "sliding scale". Most importantly, we need to reestablish "assumption of risk" as a legitimate defense in sports injury cases.

No other sector of the economy is as adversely impacted by the present liability crisis as is sorts. We need Congress and the sports community to come together to stop the hemorrhaging before we lose that which has made this country great—sports in America.

Senator KASTEN. Mr. McClain, thank you very much.

Before I begin with questions of this panel, I just want to emphasize to the members of the committee the growing coalition that I think seems to be developing.

We have sports groups. We have public groups. While I was shaving this morning, I found out that they were not going to be able to put high diving boards in I believe either Virginia or Maryland, one of the neighboring States, because they were unable to get liability insurance for the three meter board or the higher board. I cannot remember. It was not clear which it is.

We also have here the university community represented with, I think, some very powerful testimony.

In the room, we have another individual who is putting together a coalition building group. The coalition will be as broad or broader than that which is represented here. That group will be the Council for Product Liability Reform.

I would like for Mr. Robert Pritzker, if he is here, to just stand. We want to recognize the work that Mr. Pritzker is doing.

I would like to ask each of you the same question and try, if I can, to turn the tables on you. Each of you represents the problems that Mr. McClain spoke about, but you are also seeing this system every day, whether it is with injuries or patents or whatever.

Do you think that the system today is fair to the people that are injured? In other words, is it working for the person that suffers a tragic accident? I am talking about someone who is injured by a truly defective product. Is the system then working for that person that is injured by a defective product, or do you think that the lack of uniformity in the law is creating unfairness for them as well?

We could begin with Mr. McClain, and we will go right across the table, if we can.

Mr. McClain.

Mr. MCCLAIN. Senator Kasten, I think that there is a problem out there as far as uniformity because you have 50 States. They all have a different set of rules. If we have a product that is defective or the warranty breaks down or whatever, who will back that? That youth, man or woman, whoever it is, that deserves an award should certainly get it, and we have no problem with that at all.

We are concerned that one person wins a lawsuit in this State, we go to the next State, same identical type trial, a couple hundred thousand dollars in lawsuits, and this person may lose the same type trial. It is really a serious problem. That is our feeling on it.

Senator KASTEN. Mr. Reiff.

Mr. REIFF. I attempted to point out in these remarks that in a number of the Hobie Cat cases, there were States where we would win, States where we would lose, and States where we would lose punitive damages. There is no rhyme or reason to whether you are a winner or a loser, and it seems to me that most injured consumers need some reliability and predictability in what their case is about and what it can be worth.

Clearly, a consumer who wins a multimillion dollar award has a lot of money. Too often I think we think we can compensate for these nonpecuniary losses with money. That is part of the problem in the system. We are trying to throw money at a problem that money just really does not answer.

I think that uniformity is badly needed to cut out the differences between these highly successful plaintiffs and the ones that get nothing.

Senator KASTEN. Mr. Baldwin.

Mr. BALDWIN. I feel very much the same. We have 50 different sets of State laws, 50 different sets of attitudes, and in effect it is almost a lottery. Many times you will find plaintiffs who have the possibility of suing in more than one jurisdiction looking to see which jurisdiction will be most favorable to them. There should be some uniformity.

Senator KASTEN. Mr. Coyne.

Mr. COYNE. I think there is another question here that has not been raised, and that is the question of time. We are seeing today in our court system unbelievably long trials to solve what in other countries get handled in just a few months.

For example, right this minute in Schaumburg, IL, the longest trial in the history of the United States is underway. In a case involving Monsanto, the jury has been coming into a jury room every week for 150 weeks. Now, of course, we are all familiar with cases that outside of the jury portion of the case may take 8 to 12 years or longer. I do not see how any plaintiff believes that his constitutional right to a speedy and fair trial is being upheld in today's litigation environment.

The second point is, of course, that there are many, many people who are injured who are not lucky enough to be injured next to a deep pocket.

Take, for example, the spermicide case in today's Wall Street Journal, where Johnson & Johnson is considering abandoning a product which is overwhelmingly successful and widely supported by health care professionals and family planning organizations. It is considering taking it off the market for just a few lawsuits, the costs of which are outrageous.

In those cases there were, of course, people who had children with birth defects. There are thousands and thousands of other children born every year with birth defects that do not have a deep pocket to sue. I do not see there is much justice in that as well.

Senator KASTEN. Mr. Reimers.

Mr. REIMERS. We heard earlier that only $0.33 out of every dollar of a settlement goes to the injured party, and I think that would indicate there is unfairness.

Senator KASTEN. Mr. Preston.

Mr. PRESTON. First of all, I should say that I am probably not qualified to answer your question because I am not familiar with the actual cases and settlements which are involved.

Our interest in being here is really just that universities like Stanford and MIT are interested in helping the injured parties by coming up with research that is going to get them out of the wheelchairs and help to cure them. We feel that the system is impairing our ability to do that.

So I will refuse to answer your question because I do not know the answer.

Senator KASTEN. I thank you for your comment nevertheless.

Senator Hollings.

Senator HOLLINGS. Just quickly, because we are limited in time.

Mr. Preston, yours is a success story. I was trying to sit and guess how that skin tissue developed. I do not think it could be defective or unreasonably dangerous. I think it has worked, and you now have coverage for it.

Mr. Reimers, you are right about a third of the settlements, but a majority of that goes to the defendants' attorneys which can afford, Mr. Coyne, to stay in that court. How many weeks did you say, 150-some weeks?

Mr. COYNE. I was not just criticizing——

Senator HOLLINGS. Wait a minute. How many weeks is the question. How many weeks have they been in there with Monsanto?

Mr. COYNE. Just about 150 weeks.

Senator HOLLINGS. Now, if you are going to have a lawyer on a retainer, you can get him on a retainer for 150 weeks. But on a percentage retainer, how is he going to get a lawyer to stay there for 2 or 3 years trying one case on his own with no compensation whatsoever? That is why you have those fees in plaintiff's case.

Mr. Reiff and Mr. McClain, with respect to the sporting goods, I am intrigued by the mast because I lost a best friend's child plus another neighbor's child in such an accident with a mast. I live on the waterfront, and we know not to get a mast near a power line. In fact, the power companies will never allow power—I represented a power company, for everybody in this room. I have represented a defendant, too.

We know not to put power lines anywhere near a boat landing, a yacht basin or what have you. I just honestly had not seen a warning on a Hobie Cat mast. When were those warnings placed on there? How long have they been on the masts that have been sold?

Mr. REIFF. Senator, there are two. The silver one was placed on it I think in 1976, and this one was added, I guess, late 1980, 1981.

Senator HOLLINGS. You are insulating those nonconducive mast tips to replace the upper one-third?

Mr. REIFF. We had introduced a retrofit, and we are attempting to get it out in the field.

Senator HOLLINGS. That sounds excellent to me.

Mr. REIFF. It is not perfect, sir.

Senator HOLLINGS. We have Hobie Cat championships right outside the Isle of Palms where I live. Incidentally, Ted Turner won the Americas Cup but his boy beat him in a Hobie Cat race. I saw it myself. We sail those regularly, and I do not know of any case of anybody suing the Hobie Cat. I never even thought of suing you for an aluminum mast.

In any event, it strikes me that what you need are some better lawyers.

I used to sue the power company, and I mentioned to a friend who was the president and chairman of the board that I could save him money if they knew how to try a case. Finally, after I got out of the Governor's office I went to represent him, and I broke up what I called the Christmas Club.

On the bus system, nobody could get on a power company bus between, let us say, a week or 2 weeks before Thanksgiving and Christmas. Everybody was either catching their arm in the door or falling down in the aisle and getting quick settlements, and it was a Christmas Club. So I just started trying all of the cases, and we won them all. They quit and that racket was broken up.

I cannot imagine a law like Mr. Kasten's bill or Mr. Danforth's bill saving you in this particular situation. It doesn't change it with respect to those unique cases in my opinion.

Let me just save the time because I want to get some of the other witnesses.

Senator KASTEN. Senator Pressler.

Senator PRESSLER. I would like to ask Mr. Coyne, my former colleague, about the coalition. One thing that intrigues me is why we do not get corporate lawyers and business lawyers in this coalition in an organized way. It is something I have suggested to the National Association of Manufacturers and others.

I know that there are some, but the fact of the matter is that most lawyers and law firms make most of their money from corporate fees and business fees. In fact, my law school class did an informal survey. I don't know who responded to it. It was not for public release because it is not very accurate, maybe, but in addition to the incomes of my classmates being three or four times my own income it indicated that 72 percent of their incomes was derived from corporate fees.

It seems strange to me that corporations and businesses who write out checks to lawyers do not have them join the coalition, because I think there are a lot of lawyers who want legal reform. There is the Trial Lawyers of America, but the American Bar Association, I would think, could be turned around on this subject if those people who write the checks out to corporate lawyers and business lawyers would assert themselves. How can this be done, and is it being done?

Mr. COYNE. I appreciate your question. ATRA was only formed in mid-January, and for the first 3 months of our organizational life we concentrated on making other trade associations and professional associations and nonprofit groups and so forth and groups of corporate associations aware, so we did not solicit corporate participation until about a month ago. Since then, we have had a very dramatic growth in corporate participation in ATRA.

We do believe that most lawyers, and I stress this, support tort reform, from the Chief Justice of the Supreme Court to the majority of the members of the National Bar Association. In fact, I spent a great deal of time with Bill Fallscraft, the president of the American Bar Association, and he acknowledged that there was a poll within the ABA reflecting that probably two-thirds would be for and one-third would be against.

An association like the American Bar Association does not like to split its membership like that, and so they have been pursuing a strategy of, well, we will study it for another 15 years, which unfortunately is not resolving our problem.

There are many lawyer groups, I think one of which will be testifying later today, of corporate counsels and others who recognize that the plaintiff's bar is giving the legal profession a bad name by the greed that is motivating them within the current liability crisis.

Senator PRESSLER. I think that is very true. Maybe the graduates of Harvard Law School are more oriented toward corporate work, but I think it would hold up that at least half of all the legal fees paid in this country are corporate. I hope very much that your coalition will include that.

Let me ask the members of the group about joint and several liability reform. There has been much talk about this. Originally, there was not much teeth in my view in the joint and several liability reform. I feel the administration bill addresses it. I am not satisfied that the Danforth bill fully addresses it.

What is your view on that?

Mr. COYNE. If I may just start, we strongly support the abolition of joint and several liability. We think that the public views it as fundamentally unfair. The original concept of joint and several liability being appropriate for joint tortfeasors who are acting in concert has a logical basis for it. When our jurisprudence system abandons that concept of concerted action or conspiracy, it now has become simply a vehicle for finding a deep pocket.

California, as you know, in 2 weeks will have a major referendum, proposition 51, and most indications are that, despite an execrable advertising by the trial lawyers, the public seems to support the abolition of joint and several liability, especially with regard to noneconomic damages.

Senator PRESSLER. Now, the complete abolition, or the Danforth bill shifts it somewhat. It averages it out. If 1 of 3 is judgmentproof, and the other 2 have to pick up the slack and so forth. Do you consider that adequate?

Mr. COYNE. We do not think that is adequate as a complete abolition except in the areas of concerted or conspiratorial action.

Mr. REIMERS. This is sort of "bailing out of the ship," but in that area we universitities would like specific provisions making nonmanufacturing designers not liable. Universities do not have nor want any control over the process of commercial manufacture of design or presenting products for regulatory approval.

We can just look at the case here of the artificial skin. It is possible it may not be changed much by the manufacturer; however, we anticipate that if it is necessary to change it for safety reasons to make it efficacious, that the manufacturer will do so, and that the

manufacturer will also bring it before the appropriate regulatory body. The appropriate regulatory body will approve it if it is safe and efficacious.

If we could remove nonmanufacturing designers from liability, then we could safely collaborate with small companies with such products as this artificial skin, which was limited to a large company.

Senator PRESSLER. I am of the opinion that this is the most important consumer issue of our time, and I think this bill is much more important than the tax bill and lots of other things.

Let me ask for the record, to save time, I want each of you to specify for the record, if staff could ask, one or two aspects of the administration proposal you would like to see incorporated in the final product liability bill and which, if any, you would like to be certain that are not included. That is the question I would like to ask for the record.

Also, I would like to again emphasize, in closing, the necessity of our moving forward, with precious days being used up in our Senate Calendar with the tax bill coming and all the appropriations bills. I think we should all be aware that if we allow stalling or delay, we will have lost the game.

Senator KASSEBAUM [presiding]. Thank you.

Senator Ford.

Senator FORD. Thank you, Madam Chairman.

Let me just talk out loud with this group just a minute and tell you what bothers this Senator some. If your liability premium was not getting to the point where it is hard to pay, you would not be here. Then you are trying to put a cap on what an individual might be able to receive.

So in essence you want reduced liability, and yet you are saying the only way to get that is to tell the consumer out there that he is limited to his economic loss and hospital bill, or put a cap on punitive damage or pain and suffering.

I read an article last night in trying to brace myself for today and trying to get something in perspective. It asked the question of how safety-minded we are going to continue to be if we eliminate the possibility or the worry on the part of the manufacturer as it relates to liability for unsafe products. How big a chance is he willing to take as it relates to this?

I am looking at my medical profession, particularly pediatricians, where one out of every 350,000 to 500,000 may have a reaction to the DPT shot. That reaction has limited the availability for my grandchildren, maybe, to receive the shot to immunize them.

What should I do about that one child, you know? How should I adjust 350,000 good ones for that one loss? You have an array of business people that are saying my profit is down, I am going out of business all for one thing, and that is product liability. You are pressing the button for total tort reform. Is that really where we want to go? Do you want to limit my ability, or should I limit your liability or your ability to plead your case and have what we have always had, your peers making a decision?

Life, death, loss, reimbursement; all these things are there. You apparently have hit on a pretty good thing with the group that you

have put together there. I suspect you are making more than you did when you were in Congress.

The problem is how do you protect those persons out there that have a right? When you take away pain and suffering or mental anguish or punitive damages, how do you get a manufacturer that has really been in the wrong and said the heck with it? There is only 1 chance out of 10 million that that will happen, so I am going to go ahead and do it. That one individual gets caught out there, and that manufacturer does it.

I see the insurance problem of products manufactured, as I think Mr. Baldwin said, 10 years ago and you get sued 11 years later. How do you say just that the insurance company would cover only those accidents that occur within that year or that is the end of it, or you have a limitation? How are you going to factor in the treatment of that product by an individual or various owners of that product?

We cannot paint with a broad brush, in my opinion here, and satisfy everybody. We are trying to limit the trial lawyers, and in one bill here it says just give them the regular hourly wage.

Well, you do that and you limit that just to the hourly wage which is $100, $150 an hour. That would be in my territory. But soon people would gravitate to the lawyers who were winning. Of those who necessarily did not have a chance, you would eliminate some of them.

Just like the Chamber of Commerce said they are worried about the Federal Trade Commission now. There are so many lawyers around, they are getting a few good ones. And that worries the manufacturers some, because the Federal Trade Commission is getting good.

There is a mix here, and I am not sure how we ought to say by law you can only get so much.

My time is up. But I remember 6 years ago, a lot of dancing in the street; we are finally going to get them off our back and out of our pocket. I find we are getting back in, back on your back, because I find time after time after time we are being proposed legislation that limits, again puts on regulations.

You see, you are coming back now that you did not want Government in it, and Government has been getting out of it. Here we have a rash coming in like a tidal wave—said, oh, oh, we have got to change it.

It is just like deregulation of the airlines, Madam Chairman, in one of my major communities. I got letter after letter after letter, that said to deregulate the airlines. Three days after the President signed it, the major airline pulled out of that community. The letter said reregulate. Reregulate and get them back. Which way did they want me to go? You know, I am in a dilemma, and I apologize for taking so much time, but this is the panel, these are the fellows who come up here saying, Government, fix it. Government, fix it.

I have been trying to get Government out of it, and we turn around here now and find that we see intelligent, well-meaning individuals coming back to say Government, fix it.

Now tell me about that, will you?

Mr. COYNE. May I respond, Madam Chairman?

Senator KASSEBAUM. Yes.

Mr. COYNE. I think you have raised some excellent questions.

Senator FORD. I hope so.

Mr. COYNE. Probably about 45 or so, and I cannot really respond to all of them. But one of the reasons we are coming to Government and asking for relief is that the judicial system is an official activity of Government and it has always been.

Our Constitution had a concept of checks and balances and frankly this distinguished body, together with my former employer on the other side, has a responsibility and will always have a responsibility under our Constitution to take the responsibility of checking the judiciary just as seriously as you respectfully check the executive branch.

I think what has happened over the past 30 or 40 years, certainly since the late 1920's when the Congress stopped providing annual detailed oversight of our judiciary, that we have ignored, maybe with benign neglect, and allowed our judicial system to evolve a greater dependence on judge-made law, precedent-setting law by judges, rather than what our Constitution foresaw, that the other two bodies of Congress would provide the necessary check and balance.

You made an excellent point, Senator, about how there is a pendulum that goes back and forth in your district on the issue of deregulation of airlines. Everything in our society goes through pendulum swinging back and forth.

What we are here to say is that the pendulum has fallen off the clock. It has swung so far. A lawyer, 3 months ago, asserted in that distinguished legal journal, People magazine, that he was entitled to a $2½ billion fee for 8 weeks' work. Frankly, the pendulum has gone too far when trial lawyers are making that kind of assertion and are spending hundreds of thousands of dollars to oppose tort reform.

We are not trying at all to take away the rights of needy or unneedy injured people—victims. We want to see their medical expenses fully recovered. We want to see their economic loss fully compensated. But we want to see it based on a concept of fault.

You raised the question: Well, if there is no fault in a case and there is someone that is injured? Well, then, fine. Society has a responsibility, not necessarily just government, but other elements of society as well, have responsibility for dealing with those cases. But the current mechanism of dealing with those cases involves only 30 cents on the dollar getting to the injured party.

If you had a Social Security system in this country where only 30 cents on the dollar went to senior citizens, believe me, you would have senior citizens complaining. And I think the same point is what we are making. Let us make the system based on fault and we are not——

Senator FORD. You are making the point here now that the judgment—we are putting in a pension plan. The money goes there and there is *x* number of dollars. There is no chance under Social Security, and the chance is in the courtroom and the chance is in your peers making a judgment.

Now, I understand it is just fine to say that, but let us go to the issue of where one State awards something; another State awards

another one. When I was Governor of Kentucky we would take land for public use, highways primarily. I could tell you before we went to court in condemnation suits whether it is going to be appealed or not. And most of them are appealed.

Sometimes, one area would not award a sufficient amount, so the individual would appeal; in the other areas—and you could tell just exactly where it was coming from—they would award too much. So the State would have to appeal.

That is part of the system now and I do not want to get into discussing Social Security; do not bring Social Security into this. That teacher is going to call me again and say, "Wendell, what about my next month's check?" And I do not want that brought into this.

Mr. COYNE. I did not mean to bring Social Security malevolently into the discussion.

Senator FORD. Let me ask you one thing. Did that lawyer get the $2½ million? He asserted he was due that.

Mr. COYNE. Fortunately, the case is still under appeal but I think it is safe to say that when a lawyer asserts in public that he is entitled to $2½ billion—with a "b"—for 8 weeks' work, he has a distorted view of his contribution to society.

Senator KASSEBAUM. Senator Riegle.

Senator RIEGLE. Thank you, Madam Chairwoman.

Senator FORD. Do any others want to fuss at me about what I said?

Senator KASSEBAUM. I did not give him a chance.

Senator FORD. I will not argue with you. Senator Kasten I would have.

Senator RIEGLE. First of all, I think this has been an important panel and I appreciate the testimony that you have all brought today. I think it is helpful for us to hear it. I must just say in passing as I listen and talk to people who are involved in this issue that it is not just one side that is being lobbied. You may see the trial lawyers as an evil force. They see themselves as a force for good, obviously. To suggest that one side is mobilized and the other side is not is just not the case.

Both sides are fully mobilized, and properly so. It is an important issue and in our system everybody has the right to express themselves and are so doing.

But let me, if I may, Mr. Baldwin, go to your testimony which I found very interesting and helpful. I was struck by your point early on that you, a few years ago, paid a $100,000 award in a case of a cutoff saw that had been manufactured and shipped in 1946. You then pointed out that that award, plus the cost of preparing and defending a lawsuit and appeal involving that particular cutoff saw, were equal to the aftertax profits made on the sales of all the cutoff saws made by your company over 96 years of existence.

I thought that was a pretty powerful illustration of what even a single award can do in an instance of this particular kind.

Mr. BALDWIN. If I may, Senator, it is especially a problem for the small businesses that do not have the depth of resources.

Senator RIEGLE. I am struck by that. I think it is a good point.

Mr. BALDWIN. They do not have the expertise——

Senator RIEGLE. I think that is a very important observation. I do not think a small company, going back to the *Monsanto* case in a

152-week trial, would still be in that trial on the other side because they would not have the financial capability to hang in there.

You make the point later on that because of uneven judgments a manufacturer is faced with a dilemma of deciding whether or not even to make improvements in an existing product. It seems to me that that relates to the *Hobie Cat* case. You have made a product modification that you think is going to now limit the number of these electrical accidents happening on this metal pole.

But in a sense, by making the modifications, I suppose some might say well, that is an after-the-fact admission that it should not have been the other way. So, you have obviously made a business decision to go that route. It seems to me that is a good illustration of the difficulty of trying to resolve that issue and in effect remain in business.

You made the point Mr. Baldwin, that the question of whether a product is unreasonably dangerous should be answered by focusing on the state of the art at the time of manufacture rather than by using hindsight and knowledge not available at the time. That is also, I think, a reasonable point to make, particularly on products that endure over very long periods of time. I think there has to be some relevant way of looking at the difference in standards in technology and know how, and even just the durability of a product over time.

Everything in fact does wear out over time and I think that that has to be weighed here.

But I notice that where Senator Danforth has used a 25-year statute of repose for capital goods, you have suggested 12 years. Why 12? What is magic about 12 years?

Mr. BALDWIN. Absolutely nothing is magic about it. If you polled our members, they would talk about 6. But that is not politically realistic.

Senator RIEGLE. In other words, 12 just strikes you as a reasonable number.

Mr. BALDWIN. Ten, twelve, somewhere in that general area; because if a machine has been out in the stream of commerce or a product has been out in the stream of commerce for a number of years and nothing has happened to it in that time period, it is entirely reasonable then to assume that it is reasonably safe, it has endured the usage and the ravages of time, for a 10 year period or a 12-year period, and is capable then of being judged to be properly manufactured and designed.

It is not reasonable to have something be in the stream of commerce for 25, 30, 50 years or more and all of a sudden have somebody injured on it, and then have the machine or product be unreasonably designed and unreasonably dangerous when it was manufactured when it operated for many, many decades.

Senator RIEGLE. You may be right. You know, different illustrations come to mind. When they had this one major airplane accident in Japan, the Japanese were meticulous about trying to figure out why the plane went down. In going through that investigation, they found out that there was structural wear apparently in areas that are outside of the normal view of things. This was not anticipated, and as a matter of fact now there is sort of a general fix being put in those situations.

I do not know when that turned up. But it is an important issue, and I am not sure myself where that ought to fall. But I am concerned about the question of the impact on smaller business. I am concerned about the degree to which small business not only provides jobs that help in the trade areas, as you say, but is really a technology driver; for example, the small company that developed the skin substitute. If we kill off our ability to innovate within reasonable limits—I mean I think there are things that are out of bounds.

I do not want to get into the details of the Dalkon Shield incident, but here we have a situation with a product that has injured a number of people. At least that seems to be the strong body of evidence. It has in a sense driven that company either into chapter 11 or the equivalent of that.

Let me just ask you one question, because our time is up here. That is, in the case of a clear product failure, a clear product failure where the loss of life occurs. Imagine a case where some product is manufactured and is consumed. Let's say it is a product that is consumed and that in fact it carries the risk of death because of some flaw in the product. In fact people are killed, whether infants or adults is not the issue, but there is an established linkage between the two.

What is the appropriate dollar limit that we ought to think about in terms of the figure we ought to set in the case where somebody actually dies. Not just one isolated person, but maybe a lot of people are killed in terms of the universe of people using that product. I am just wondering what your thought is on that? I mean where do we set that number if we are going to try to do it at the national level?

I can see the need for national uniformity. The insurance industry has been one industry that has basically been a 50-State industry so you have got this very uneven pattern around the country that makes it very difficult to reach in and collect that problem and come up with a national answer, even though it may be required in some areas.

But if we are going to get into this business, how do we go about setting what is an appropriate level of recovery when there has been something as basic as a death resulting from a product that caused the death?

Who would like to start?

Mr. REIFF. Well, obviously you have raised the tough social questions that are inherent in all of this business. I guess the easy way is to duck that answer a little bit.

Senator RIEGLE. We cannot duck it. We all have to face it.

Mr. REIFF. There are things to focus on other than—what you are really getting are caps. There are other things to focus on. I did not have a chance to respond to Senator Ford but what I would do, I think, and this is oversimplifying—I am just a Kansas lawyer here in Washington.

Senator RIEGLE. I am just a Michigan Senator. We are in the same boat here.

Mr. REIFF. What I would focus on, first of all, is the way the fault is assessed, to begin with, and see what I thought had changed

markedly in the assessment of the way the fault standard has developed even over the last 10 or 15 years.

This is not a brand new 1986 problem, obviously.

Senator RIEGLE. I want you to try to just answer a very narrow question for me. I realize there are a whole lot of collateral factors. Where you have a situation where we find that some medication causes the death of a certain number of the users of the medicine, and we find that lives are lost that way, how do we set the outer bound in terms of what constitutes a proper recovery in that case?

Is it $100,000 where a death occurs or is it some figure higher than that? How do you establish that number? Without getting into the collateral factors—this is one of the questions that is going to be answered in this bill. It is in the bill.

So in effect, give me your response on that.

Mr. REIFF. I think it is the pecuniary loss that you can attribute to that, and you have not tried——

Senator RIEGLE. Do you have children?

Mr. REIFF. I am sorry?

Senator RIEGLE. Do you have children?

Mr. REIFF. Yes, sir.

Senator RIEGLE. So do I. You lose a child or I lose a child. How do we put a loss figure on that? Doesn't the word "pecuniary loss" lose its meaning in that case?

Mr. REIFF. Yes, sir; I think it does.

Senator REIGLE. How do we establish meaning in terms of setting the loss?

Mr. REIFF. I do not think dollars do that very well.

Senator RIEGLE. Well, the dollar figure is in the bill. So I do not think you can duck the issue. We cannot duck the issue that way, so I am not sure you should be able to duck the issue that way.

We are going to set a figure. You know, I am asking you really for a judgment, the best judgment you can make.

Mr. REIFF. You are talking about the administration bill. I think, personally, that uncapped pecuniary loss, and I think the $100,000 I think is what it is, is the number. I mean it is obviously not any more right than $150,000 or $200,000 or $50,000.

Senator RIEGLE. So you are satisfied with $100,000 figure?

Mr. RIEFF. Yes, I am.

Senator RIEGLE. Would anybody dissent from that or have a different thought to add, so that we do not just use more time?

Mr. COYNE. I would not dissent, but I would echo that it is impossible to take a number like that and create an equation. For example, your own children. I have three children under eight. Do you have any life insurance on any of them?

Senator RIEGLE. Yes, I do.

Mr. COYNE. What is the amount that you put on your life insurance for them?

Senator RIEGLE. Not as much as I think they are worth.

Mr. COYNE. Right. Well, neither do I.

Senator RIEGLE. Now, wait a minute. That does not mean that if somebcdy is selling a product over the counter that is advertised to be safe, and I give it to the child and it kills my child, that somehow that has to be related to the question of life insurance. It is a question of responsibility of a loss of a life.

Mr. COYNE. I was not saying it should be related to life insurance. I was just saying that you and I and all of us cannot make a judgment like that.

Senator RIEGLE. But we are being asked to do it.

Mr. COYNE. No, I do not think you are being asked to do it for medical damages; you are not being asked to do it for economic loss. The only thing you are being asked to do is to do it on the noneconomic damage portion which is a difficult problem.

Senator RIEGLE. I think you are sidestepping this, with all due respect. I mean the toughest question of all—and that is the reason I posed it, because we are here to try to sort of make a collective judgment. Nobody is necessarily right or wrong here. But the question is, if you take the ultimate loss, the loss of a human life because a product caused that death, how do we assess the question of the value of that loss or the damage that has been incurred in that situation?

I guess in my own mind I do have some difficulty saying that in an egregious case $100,000 is the proper figure. I do not know what the proper figure is, and that is why I think there is a certain value in terms of looking at the specifics of the case and having some group of people try to make a decision because I am not sure that it is possible to write a clean, crisp, sort of one-shot answer that fits all cases.

But because that is the approach that is being recommended here, I think that locks us all in to try to come up with what that figure should be.

Mr. COYNE. With all due respect, Senator, those of us who are no longer Congressmen look to our Congress for making that kind of tough decision. You do it, for example, when a military serviceman is killed in action, and you set a dollar value.

Senator RIEGLE. You are exactly right. But you folks are here as expert witnesses and your opinions count.

Mr. COYNE. And we think $100,000 is fair. I think when you look at the other figures that the Government, the judges, for example, on military serviceman that are lost in action and the compensation that is made to their children and widows, it is consistent with that kind of—it is not an out-of-the-ballpark figure.

And whether you come up with $105,000 or $200,000——

Senator RIEGLE. Wait a minute. I think there are some comparisons that work and some that do not. When you are called into service for your country and you are put at risk and everybody knows that, that is one thing. That is a very different situation than going in and maybe buying a medical product off the shelf and feeding it to your child and your child dies. That is a different situation.

Mr. COYNE. That is a different situation.

Senator RIEGLE. And I think we need to intellectually assess answer and not sort of slide off to the side.

Mr. COYNE. But it is equally tough to quantify. That was my point. It is tough and——

Senator RIEGLE. That is one of the difficulties of the bill. You see, you cannot come and ask us to quantify it and say, but look, we really can't quantify it. You guys do that.

Mr. COYNE. But the public asks the Congress to quantify unquantifiable things all the time and it is a difficult thing. We are just trying to give your our input as to where it should be quantified.

Senator RIEGLE. We are going to do the best we can.

Senator KASSEBAUM. Let me just say, Mr. Reiff, I have a lot of confidence in a Kansas lawyer.

Mr. REIFF. Thank you, Senator.

Senator RIEGLE. Particularly the one that is in the chair.

Senator KASSEBAUM. Well, I am not a lawyer.

Senator RIEGLE. Well, you are the next thing to it.

That is said in complimentary fashion. The person that wields the gavel in this room is a de facto lawyer, believe me.

Senator KASSEBAUM. I thank the first panel and very much appreciate everyone's patience and testimony. We will move on to the second panel.

If the room could clear out, we could get ready and move ahead with the second panel.

I think I will just introduce everybody by the list I have, which does not necessarily correspond with the way everyone is seated. Is is a pleasure to welcome Christopher Hitchcock, director, Public Relations, Crawford Fitting, representing the National Federation of Independent Business; Jeffrey Joseph, vice president, Domestic Policy, U.S. Chamber of Commerce; Martin F. Connor, representing the National Association of Manufacturers; Gene Kimmelman, legislative director, Consumer Federation of America; Joseph Goffman, staff attorney, Public Citizen's Congresswatch; Linda Lipsen, legislative counsel, Consumers Union; Pamela Gilbert, staff attorney, U.S. Public Interest Research Group.

It is a pleasure to welcome all of you. Shall we go in order of the names I read as far as who will testify. Mr. Hitchcock?

STATEMENTS OF CHRISTOPHER HITCHCOCK, DIRECTOR, PUBLIC RELATIONS, CRAWFORD FITTING CO., REPRESENTING THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS; JEFFREY JOSEPH, VICE PRESIDENT, DOMESTIC POLICY, U.S. CHAMBER OF COMMERCE; MARTIN F. CONNOR, REPRESENTING THE NATIONAL ASSOCIATION OF MANUFACTURERS; GENE KIMMELMAN, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA; JOSEPH GOFFMAN, STAFF ATTORNEY, PUBLIC CITIZEN'S CONGRESSWATCH; LINDA LIPSEN, LEGISLATIVE COUNSEL, CONSUMERS UNION; AND PAMELA GILBERT, STAFF ATTORNEY, U.S. PUBLIC INTEREST RESEARCH GROUP

Mr. HITCHCOCK. Thank you, Madam Chairman. I am Chris Hitchcock and I sincerely appreciate the opportunity to testify on the critical problem of liability insurance before the country and this committee.

I am with Crawford Fitting Co., a little company in Solon, OH, which is just outside of Cleveland. We manufacture tube fittings and valves—fairly boring things, but they are for the high technology designs used in the aerospace, petrochemical, and nuclear industries, to name just a few.

I am also an NFIB member and am here to testify on NFIB's position, as well as my company's experience with product liability.

I have gotten involved in this issue not because my company's excess liability insurance premiums have gone up 15 or 20 percent but because they went up 1,535 percent in 1985 alone. Because of that increase, we have eliminated some of the costliest insurance items—for example, valves for hot air balloons, whose insurance cost was more than our total sales of that item and jet engine fuel system valves, where we were totally refused insurance.

We have rearranged our insurance with the prospect of now going bare for the first time in our company's history at some of the excess insurance levels. I decided it was high time to get involved. I only hope it is not too late.

Although NFIB's membership as a whole has until recently opposed Federal product liability standards, last December they reversed positions indicated by polls in 1981 and 1982 and voted with over 65 percent in favor of Federal standards. On behalf of both NFIB and my company, I wish to express strong support for Senator Kasten's most recent product liability reform bill, as introduced.

The importance of tort reform to small business has become evident via the recommendations put forth by small business owners at the State meetings of the White House Conference on Small Business. Over 30 States made tort reform one of their top 5 issues.

Senator Kasten's legislation is the result of the report compiled by the administration's Tort Policy Working Group. As introduced, the legislation is clear, simple, and direct. We favor this pure tort reform approach without amendments for several reasons.

First, there is no question that the operability of our civil justice system is being undermined by excesses. Million dollar awards are becoming more commonplace. Court case loads are growing by leaps and bounds. Tort reform is needed to address these problems.

Second, these excesses translate into costs and uncertainty for insurers. Controlling awards and contingency fees and limiting liability will help control insurers' costs and help them determine risk, consequently reducing premiums and improving insurance availability.

Third, tort reform has been more thoroughly studied and there is relatively widespread familiarity with all the concepts involved. Fourth, and perhaps most important, the legislation as introduced commands the support of the vast majority of the business community, and this support is vital to passage.

Previous legislation has included provisions over which the business community has been divided. One such provision is the elimination of the employer's right of subrogation. NFIB members voted 71 percent in opposition to the elimination of it. Currently most States—I believe 40—allow an employer to recover from the manufacturer the cost of workers' comp payments made to an employee who wins a product liability suit. Federal preemption of the State law in this regard is not pure tort reform and should not be part of this bill.

From my company's perspective, a fifth reason to support the proposed legislation is to keep U.S. manufacturers competitive in the world marketplace as domestic companies that move offshore to avoid these high costs of insurance reduce the number of manu-

facturers among which to spread the risk in this country, thereby causing insurance rates to increase again. It is a catch 22.

In conclusion, I want to express my sincere appreciation to both the chairman and the other members of the Senate Commerce Committee for their efforts to move product liability legislation through this Senate. With the support of the administration and a majority of the business community, Senator Kasten's amendment to S. 100 as introduced offers the best chance of enactment for real Federal product liability reform now.

Madam Chairman, I would hope that you would allow NFIB to add an additional statement for the record. Thank you very much.

Senator KASSEBAUM. That will be done. Thank you.

Mr. Joseph.

Mr. JOSEPH. Thank you, Madam Chairman.

I am Jeff Joseph, vice president for Domestic Policy of the U.S. Chamber and I am pleased to be here today.

Today the need for Federal product liability law is greater than ever at a time when an unprecedented liability crisis in this country threatens the American business and the public at large. The cost of not enacting product liability reform years ago has become all too clear.

The chamber is encouraged that Chairman Danforth has offered his leadership as well as his personal commitment to enacting product liability reform. We are also encouraged that Senator Kasten, who has devoted many years to product liability reform, has introduced the Reagan administration's product liability reform proposal, and we listened with great interest this morning to the comments of Senator Gorton on his plans.

But based on what we know coming into the hearing and what we have been able to study over the last several months, even going back years, the chamber has concluded that the Reagan administration's proposal, as introduced by Senator Kasten, is generally consistent with chamber policy to seek a balanced Federal product liability law. The chamber supports this legislation and requests the committee to move it forward.

With respect to the other legislation, the chamber understands the committee's desire to explore alternatives to the tort system in settling product liability disputes. However, as to alternative compensation systems the chamber has serious questions as to whether such programs actually can work. Without the certainty that a workable and fair compensation system can be developed, there is a risk that some industries will fare even worse under compensation systems than under the current tort system.

On the other hand, the chamber believes the administration's package of recommendations highlights principles that are absolutely necessary to product liability legislation, and I emphasize the word "principles"—principles that are moving many of the States today as State legislatures move forward in a broader context of tort and civil justice reforms.

But first this legislation restores the role of fault and causation to the system. Second, it limits noneconomic and punitive damages. Third, it addresses the issue of joint and several liability, and I might add that we support Senator Pressler's efforts in this com-

mittee to reform the rules of joint and several liability to remove this unfair element from our product liability laws.

Fourth, we support the Reagan administration's proposal that attempts to reduce transaction costs by placing some regulation on attorneys' contingency fees. And although the administration's proposal contains elements that are essential to any new product liability law, it is by no means all-encompassing.

For example, the chamber supports providing alternatives to lay determinations of complex medical, scientific and technological issues. The private litigation system simply is not suited to addressing all of the many complex social issues such as how much design safety should be incorporated into a product. Neither is the process of individual adjudication able to determine when certain products should be available to the public, despite dangers that may be inherent.

The proposal also does not address the issue of liability in the passage of time. Because it does not provide for a statute of limitation or a statute of repose, conflicting State laws will continue to cause excessive litigation on these points.

Finally, the bill does not attempt to resolve conflicts that could develop when product liability arises in the context of workplace injury. But despite the silence of this proposal on the above-mentioned points, its simpleness and clarity elicit our support. Overall, this legislation better enables the pinpointing of fault and allows both sellers and buyers to know the consequences of their actions.

The U.S. Chamber first came before this committee more than 5 years ago in support of a Federal product liability law, and that was out of the frustration of having spent 5 years in the States before that trying to urge the passage of a model State bill. The fears we had a decade ago have now been realized. Those were fears of excessive litigation clogging the courts, useful products being withdrawn from the marketplace, and escalating insurance costs that now cast a shadow over the future well-being of the whole business community.

The chamber urges this committee to correct present inequities in the tort system and to begin enacting the Reagan administration's product liability reform proposal.

Thank you very much.

Senator KASSEBAUM. Mr. Connor.

Mr. CONNOR. Thank you, Madam Chairwoman. I am Martin Connor. I am Washington counsel for General Electric. I am here today testifying for the National Association of Manufacturers.

I hope I can be very brief. NAM has testified before this committee on this subject, if my memory is correct, five times over the last three Congresses—this Congress and the preceding two Congresses.

Senator KASSEBAUM. You are all very familiar faces.

Mr. CONNOR. I hope this is the last time I testify before this committee on this subject.

Senator KASSEBAUM. I will say this, Mr. Connor: There is no doubt in my mind that when we begin markup on June 3, somebody on this committee, probably more than one person, will say well, why the rush? We have not had enough hearings on this subject.

Mr. CONNOR. It has been said this morning, Senator, while you were out.

Senator KASSEBAUM. Has it?

Mr. CONNOR. And I think that is the message. That really is NAM's message this morning in a nutshell. We have said just about everything we have to say on the need for product liability legislation. We have given our thoughts on the form such legislation should take, and we would strongly urge the committee to move forward, to mark something up, and let us get on with it on June 3.

You have in front of you now two fairly different proposals, amended S. 100 and amended S. 1999, and this morning, Senator Gorton indicated that he has a further revision of his proposals. We are confident that out of these three proposals something can be fashioned which will be acceptable to everybody involved, that will give the business community the predictability that it needs for insurance ratesetting and for risk management, and that will be totally fair to injured people, will eliminate the delays, the transaction costs, and so forth, that any rational system, any fair and sensible system, should.

I would like to take a minute first and look at S. 100 and at the provisions of S. 1999 which deal with tort reform. They each, as I count them, deal with six basic issues. Senator Kasten's bill deals with a standard of liability, joint and several liability, damages for noneconomic loss—a subject we have had some controversy about here this morning—periodic payment of damages, the collateral source rule, contingent fees.

What I find as I travel around, as I do, to the various State houses across the country, is that these are the gut issues of tort reform. These are the issues that are being debated, and I think it is fair and it is appropriate that the administration raise these issues before this committee.

Title III of your bill, Senator Danforth, S. 1999, takes a different approach. It addresses a series of equally basic issues, but issues which are either specific to product liability or are dealt with within the specific context of product liability. And there are about six of them: product seller's liability, the relationship of product liability to workers' compensation, punitive damages, comparative responsibility, statutes of limitation and repose, and admissibility of evidence of subsequent remedial measures.

We, at NAM, can understand the administration's desire to deal decisively with a few critical issues, particularly since it seems clear that, as Attorney General Meese indicated this morning, they are trying not only to solve the product liability problem but to hold up a model to the States for their action in more generic tort reform. And we also appreciate the appropriateness of identifying and dealing with the specific trouble spots of product liability which are dealt with in S. 1999.

I see nothing inconsistent in these two bills. NAM would urge the committee to establish priorities among these dozen or so topics and to make the hard choices among the various competing options that you have. We, at NAM, would urge that whatever come out be simple. We have a terrible propensity, I think, in our society, to fashion complex solutions for complex problems. when in fact what

we need are simple solutions for these complex problems, I think that is possible here.

There is another aspect to S. 1999, a settlement-facilitating or forcing procedure in its title II. In the latest amendment, this procedure is very close to what NAM suggested in its testimony here a few months ago. NAM has some problems, however, with this procedure. We support it in principle. We would like to see it simpler. We agree with the suggestion made by Senator Gorton this morning that it might better be incorporated within the litigation process so that it is under judicial management.

We would propose within the next few days to submit to the committee a specific recommendation on revisions to title II which would accomplish what we think are some helpful changes along with the reasons for those recommendations.

Thank you very much.

[The statement follows:]

STATEMENT OF MARTIN F. CONNOR ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Good morning, Mr. Chairman and members of the subcommittee. My name is Martin F. Connor. I am Washington Corporate Counsel for General Electric Company, testifying today on behalf of the National Association of Manufacturers as co-chair of the Product Liability Subcommittee.

The National Association of Manufacturers is a voluntary business association of over 13,500 companies, large and small, located in every state. Our members range in size from the very large to over 9,000 small manufacturing firms that each have less than 500 employees. NAM member companies employ 85% of all workers in manufacturing and produce over 80% of the nations' manufactured goods. NAM is affiliated with an additional 158,000 businesses through its Association Council and the National Industrial Council.

I. INTRODUCTION

NAM has supported enactment of federal product liability legislation for several years. Today, however, the crisis is extremely grave. Insurance unavailability and unaffordability is only one result of the patchwork of 50 state systems now in effect. Every day NAM receives letters from companies who are discontinuing lines of good products because of "potential future risk." Still others report increasing product costs, an unwillingness to undertake research and development, an inability to compete in the marketplace—and in some instances a cutback in employees. Many small companies going bare readily admit that one huge product liability suit will result in bankruptcy and an end of their family business.

As a result, we urge this committee to quickly and rapidly consolidate the various pending proposals into one bill curbing the worst abuses in the system as it exists now. Beyond that, NAM will remain committed to working with Congress for longer-range solutions to the difficult issues raised in this area. For, if we have learned anything during the long debate over product liability reform, it is that no single bill will solve all the tort-liability problems posed by our complex society. However, we must start down the road toward bringing uniform and stable product liability law to our nations' consumers and manufacturers.

Before us today are two very different bills and two very different approaches to product liability reform. The Administration's bill, sponsored by Senator Kasten is a streamlined approach to tackling some of the most glaring excesses in the system. It reflects, we believe, a very broad-based popular consensus. State after state has enacted or is considering legislation based on principles embodies in the Kasten bill. We applaud this approach. It would effect simply and immediate reforms that the manufacturing community believes will bring predictability and uniformity to product liability laws.

The amendment to S. 1999 includes in its Title II a rather complex settlement-forcing procedure designed to eliminate transaction costs, while providing prompt payment for injured parties. We doubt that in its present form it will achieve that very laudable goal. We are optimistic, however, that it can be revised in ways that will make it more effective.

NAM is confident that the concepts of both bills can be merged. Our proposal is to simplify S. 1999's settlement procedure and couple it with the tort reforms proposed by the Administration in Title III of S. 1999. We will review both bills very briefly and amplify on what we believe is a viable approach that will meet the goal of both bills.

II. THE KASTEN-ADMINISTRATION APPROACH

NAM's policy on product liability, adopted by our 235-member board of directors several years ago, embraces almost every reform in the Kasten-Administration bill. The centerpiece of any reform, we believe, should include: limitations on joint and several liability, the return to fault-based liability, a cap on non-economic damages, the reduction of awards by payments from collateral sources, the basing of causation on credible scientific evidence. NAM also supports periodic payment of future damages, the capping of contingency fees and procedures to encourage settlement.

This year hundreds and thousands of groups throughout this country are seeking the same types of reform in state after state. The reason: these types of solutions attack the most blatent abuses in our tort system.

Every state legislature in session this year is considering either generic or industry-specific tort reforms. On the states' plates are more than 1,200 bills. Legislators are rapidly adoting reforms along the lines suggested by the President. A month ago, the Maryland legislature approved legislation limiting awards for noneconomic damages to $350,000. South Dakota limits all recoveries in medical malpractice cases to $1 million. Wyoming has abolished joint and several liability. Californians will decide by referendum June 3 an initiative that will cut deep into the "deep pocket" rule of joint and several liability. The Illinois Legislature, which witnesses 3,500 residents march on the Capitol in favor of reform a month ago, currently has some 200 bills facing it.

The most sweeping reforms have been enacted in Washington and Colorado since we addressed this committee just three months ago. Washington has approved a law that caps payments for non-economic damages at about $350,000 based on a formula tied to the average annual wage of Washington residents. It has abolished joint and several liability in many cases and allows for periodic payment of awards for future economic damages exceeding $100,000. And, it releases directors and officers of non-profit corporations and school directors and superintendents from almost all liability. The Colorado Legislature has approved an even more comprehensive package and the major bills are currently awaiting the Governor's signature.

NAM believes these state-by-state reforms, while helpful in the larger tort context, will not adequately solve the product liability crisis. Product liability needs a federal solution. That solution, however, should not disregard the types of reform now sweeping this nation. Indeed, it should incorporate the best of them and serve as a model for states which have not yet acted. For this reason, we endorse the Kasten/Administration approach.

We must add, however, that several issues that are unique to product liability reform are not dealt with in the Administration bill. NAM would urge, for example, the adoption of a reasonable statute of limitations and a reasonable statute of repose. Both of these concerns are embodied in the latest draft of S.1999. We also urge inclusion of a seller's provision and of a provision that would exclude evidence of subsequent remedial measures as proof of a product's defect. These provisions are also included in Senator Danforth's bill.

III. S. 1999: AN ANALYSIS

Over the past year, NAM has worked closely with the Committee staff and other interested parties to develop a viable two-prong system: one aimed at improving the tort system, the other to provide an alternative claims system.

The settlement-forcing system outlined in Title II of the new draft is a serious attempt to remove claims from the tort system and dispose of them fairly, promptly and at minimal cost. While NAM supports this effort, it believes that considerable revision of Title II is necessary.

First of all, the settlement-forcing procedure involves, in our view, a perverse system of incentives. On the one hand, the major system reforms—such as the modification of joint and several liability and caps on non-economic damages—are operative only if payment of net economic loss has been offered to the injured person. On the other hand, failure to pay both net economic loss and up to $250,000 in "dignatory loss" in the expedited settlement procedure results in severe penalties if the manufacturer opts to fight his case and loses. The penalties, in a normal course of events could be two or three times the claimant's compensatory damages!

First, NAM urges this committee not to broaden the scope of "net economic loss" for settlement purposes by including "dignatary loss." Damages of this sort are unliquidated by definition. Their appropriateness and their amount will be contested in every case. Their inclusion is totally uncontested with the purposes of Title II.

Secondly, any settlement-forcing process should be subject to judicial control and thus operate within the context of a law suit. The proposal, in our view, treats too lightly the need for a dispute-reduction mechanism within the settlement process.

Third, the system of incentives and disincentives should be reexamined and revised.

Title III of the revised S. 1999 provides much-needed reform, which NAM endorses. We support the enactment of uniform statutes of limitation and repose, the provision on subsequent remedial measures, the application of comparative responsibility, offsets for workers' compensation benefits and elimination of employer rights of subrogation. We also believe a good bill must tackle the issue of punitive damages, placing limitations on the ultimate award and bifurcating the process. Furthermore, we support a product seller provision, which we believe is necessary to adquately address the product liability issue.

IV. NAM'S PROPOSAL

NAM believes a good, simple bill can be developed through combining provisions of S. 100 and S. 1999, and coupling them with a simple settlement encouraging process.

A combination of Title III of S. 1999 with the major reforms outlined in S. 100 will improve the system and establish the framework for a good federal product liability law. Such reforms will give insurance companies the predictability needed in assessing risks and provide for manufacturers and sellers with a rational basis for risk management. These reforms will not inhibit consumers from bringing fair claims and collecting fair payment for their injury when the manufacturer is at fault.

NAM suggests that this Committee consider a simple settlement encouraging procedure which would encompass the best of the Danforth bill: time limitations to begin settlement negotiations and economic penalties for the losing party if settlement is rejected.

We propose a system whereby the plaintiff could annex to its initial complaint, a demand for the manufacturer to pay net economic loss. Similarly, once a complaint has been filed the manufacturer could offer to pay net economic loss. Once such a request was made, the other party would have a limited period within which to respond to the request. An agreement by either party to settle for net economic loss would preclude further legal action. If either party has refused the other's offer to settle for net economic loss, it will be subsequently responsible for paying the other's litigation costs if that party prevails. We believe such a simple system will speed the decision to settle out of court on both sides when there is a valid claim. Furthermore, we do not believe it will unduly hamper the plaintiff's or manufacturer's opportunity to fight a legitimate case in court.

V. CONCLUSION

There are merits to portions of both the amended S. 1999 and amended S. 100. Neither are perfect, nor will they solve all the product liability issues raised. We believe that if our recommendations are accepted, you will have a bill that the manufacturing community will wholeheartedly support. We believe you will also have the support of the majority of the nation as well. NAM stands ready to work with this committee in achieving a fair and balanced bill which can be reported out of Committee in the very near future.

Senator KASTEN [presiding]. Our next witness is Mr. Gene Kimmelman, the legislative director of the Consumer Federation of America.

Mr. KIMMELMAN. Thank you, Mr. Chairman.

Mr. Chairman, Chairman Danforth, you probably never thought you would hear me saying this, but I think there is some good news for consumers on the table today. We believe that Senator Danforth's and now, it appears, Senator Gorton's proposals of a settlement system with incentives streamlined to meet the needs of consumers for swift, adequate compensation, with strong financial sav-

ings for defendants that are triggered when settlement is offered is a major step forward. We are happy to see it on the table.

We believe this will lead to the establishment of more efficient, equitable settlements as the foundation for product liability legislation. We commend you for your effort.

Unfortunately, with the good news there is also some bad news, and that is the notion of capping product liability awards, which we believe has nothing to do with creating adequate incentives to settle these disputes, and which we think would undermine the rights of the most severely injured product victims.

Now, I believe pain and suffering has been mischaracterized this morning and previously before this committee. Most often it involves severe economic and social dislocation from permanent, severe injuries, like amputation of arms, legs, disfigurement from severe burns, paraplegia, brain damage, and quadriplegia.

In the small percentage of cases, less than 10 percent, that involve these severe injuries, economic compensation defined as wage loss and medical expenses only scratches the surface of real economic and social loss. Take, for example, burn victims whose treatment includes scrubbing and showers and skin graft after skin graft after skin graft.

An example in our testimony describes someone who needed antibiotic treatment to take care of infections and ended up becoming deaf as a result. And for what? Only to face career, family life, life in general ruined by disfigurement, unless we can get them on their feet again, even if it is with an artificial limb, to be productive citizens with a desire to participate in our society and our economy.

Pain and suffering gives such victims a chance to make up for their catastrophic economic and social loss. Now what happens when you try to cap pain and suffering? Well, besides arbitrarily cutting off recovery for the most severely injured people, there is a tremendous problem of inflexibility over time with a cap. If you decide that there is a specific figure that is equitable, how do you deal with the equity over time—5 years, 10 years or 20 years? What is the social and economic equivalent of that cap over that period of time?

Take, for example, the average 35-year-old worker who in 1975 as a result of a defective product was rendered quadriplegic. This is the average person from the Insurance Services Office study. A quadriplegic. The average award for this person in 1975 was $505,000, including $63,000 for medicals, $190,000 for wage loss, and $253,000 for pain and suffering—approximately the cap in title III of Senator Danforth's bill.

Now, if this was a median-income wage earner, this person, losing 30 years of useful work, would have lost over $350,000 in earnings. How would we update that, for example, to 1984? What has happened since 1975? Well, the cost of hospitalization has gone up 185 percent. The median wage has gone up 90 percent. If you add these to this median wage earner's income, the economic award would be $541,000 in 1984.

And what do you do with pain and suffering? Well, the purchase power of the dollar is about half today of what it was in 1975. At that time, according to the ISO, the ratio of pain and suffering to

economic loss was 1 to 1 for this size of award. Now the constant dollar value of 30 years' lost wages would be over $670,000. And people are living longer today, 2 to 3 years longer than in 1975.

If treated exactly the same as this victim in 1975, our 1984 victim would receive over $1 million, $1,082,000, with pain and suffering at more than twice the cap in the Danforth bill. Is that unfair? Is that inequitable? How do we treat pain and suffering over time? Even receiving this $500,000 in pain and suffering would only barely keep this person up to the lost wages he suffered as a result of this injury.

A close look at product liability claims reveals that only a small percentage involve serious impairment like I have described, and these cannot be fairly handled with a cap on pain and suffering. Why penalize these severely injured people? Are we afraid they will have incentives to waste resources and litigate? Well, already, according to the ISO, over 96 percent agree to settle their claims. With the swift settlement mechanism in the Danforth proposal, we believe even more will settle. Defendants who gain collateral sources and a cap on pain and suffering in this settlement system, have even more incentive to settle these claims.

Therefore, we believe that if these severely injured, disabled individuals can prove their case in court, they should be awarded full compensation. It makes no sense to arbitrarily cut off their rights after they have established in a court of law the validity of their claim. We urge the committee to preserve Senator Danforth's settlement incentive approach but to eliminate the unnecessary inequitable caps on recovery for fully litigated claims.

Thank you.

Senator KASTEN. Thank you. Our next witness is Mr. Joseph Goffman, staff attorney for Public Citizen's Congress Watch.

Mr. Goffman.

Mr. GOFFMAN. Thank you, Mr. Chairman.

Consumers owe Senator Danforth both praise and thanks for pushing the public debate on compensation for the victims of dangerously defective products as far forward as they have with the introduction of the Danforth substitute to S. 1999. The settlement system created by the Danforth substitute may well represent a breakthrough in the effort to provide victims of dangerous and defective products with speedy and just compensation for their injuries in an economical, efficient, and litigation-reducing way. Though we find it unjust and downright anomalous that under the Danforth substitute victims who prevailed after trial could still suffer a cap on their recoveries, including a formulatic cap for punitive damages, we nevertheless hail the overall framework of the settlement system that the Danforth substitute would create.

Likewise, we very much appreciate the outstanding efforts of Senator Gorton in continuing to develop a host of ideas crucial to the establishment of an effective and fair compensation system for injured consumers.

Unfortunately, the dark cloud of the Reagan administration proposals now contained in the Kasten substitute to S. 100 hangs menacingly over this debate. Rather than fostering speedy and adequate recoveries for wrongfully injured victims and providing the protection and safety incentives for all consumers, the provisions of

the Kasten substitute serve the undisguised purpose of depriving injured victims of adequate compensation and of discarding vital incentives for the prevention of accidents and injuries in the first place.

The Kasten substitute would essentially offer manufacturers a hefty discount on the cost of their wrongdoing, no matter how egregious or devastating to consumers. For example, section 9 would require that private health insurers and public benefit programs not protected by subrogation pick up the tab first for accidents and injuries caused by the wrongdoing of manufacturers.

Section 6, which all but repeals joint and several liability, dictates the following tragic result. If among a group of defendants, all found guilty of wrongdoing that caused someone's injury, one or more of the defendants could not pay its pro rata share of the victim's compensation, then it would be the injured victim who would be forced to go without that portion of compensation. None of the wrongdoers would be called upon to contribute one cent to make up for the missing portion of the victim's recovery.

Perhaps the grim spirit of the Kasten substitute is best captured by section 7, which imposes a $100,000 cap on all noneconomic damages. As a result, the child who suffered permanent brain damage, the young parent paralyzed from the neck down, would be able to recover no more than this amount in compensation for the fact that the quality of living had been unalterably destroyed for them.

Included in this cap as well would be any amount that a jury could award as punitive damages. Thus, no matter how flagrant a manufacturer's misconduct, no matter how compelling the case for punishment, no jury could ever levy more than $100,000 to effect that punishment.

The provisions of the Kasten substitute send a shocking message to manufacturers and consumers. The message is this: No matter how flagrant a manufacturer's malfeasance or catastrophic the effects of its wrongdoing, the law will protect that manufacturer from the full financial consequences of its acts, even at the expense of the victim.

Even without the foil of the administration's proposal, the wisdom of the settlement framework designed by Senator Danforth would be obvious. Ironically, the Danforth settlement framework offers manufacturers very much the same rewards that the Kasten substitute does, but for the purpose of promoting rather than denying compensation, for the purpose of increasing efficiency, not depriving victims.

The Danforth settlement system would allow manufactuers to benefit from a claimant's collateral sources, but only if the manufacturer settled and provided that victim with compensation. The Danforth settlement system would allow manufacturers a cap on the pain and suffering they had to pay, but only if the manufacturer settled and compensated the victim.

In other words, it would be in providing the victims with adequate compensation for their out-of-pocket losses and their permanent impairments that manufacturers could win the very same benefits that they seek from the administration proposal.

In short, the key to the Danforth settlement system is balance. For this reason, blanket alterations in tort law that favored defendants would destroy the settlement system by disrupting that balance. For the same reason, the cap on pain and suffering included in title III is simply unnecessary. The balance of incentives in the settlement system would function perfectly well without it, and with such a cap the bill would be unbalanced and unfair.

While the settlement system would leave defendants free to spurn settlements and prove their innocence, the title III would prevent severely injured victims from proving their case and receiving full recovery.

Thank you very much.

Senator KASTEN. Thank you, Mr. Goffman.

The next witness is Miss Linda Lipsen, legislative counsel, Consumers Union.

Ms. LIPSEN. Mr. Chairman, thank you very much for inviting us today to discuss this very important issue for consumers. I will be confining my remarks to the settlement system of title II of the amendment to S. 1999 and leave our critique of the remainder of this proposal to my colleagues and our written statement.

The settlement system as embodied in title II reflects a fair balance, we believe, between the interests of consumers and the desires of manufacturers. It promises injured consumers prompt, but more assured recoveries and allows manufacturers to substantially limit the amount they pay out to victims.

The give-take achievement of title II, a workable settlement system, can only be fully realized if the tort system remains free of anticonsumer provisions like automatic caps on awards and limitations on punitives. As we have recounted at various times before this committee, the litigation process does not encourage timely settlements. Indeed, the Insurance Service Office closed claim study on product liability, demonstrated that the percentage of claims which receive payment tend to increase as the stage of the legal system becomes more advanced.

This is very true, despite the fact that manufacturers know that if the plaintiff prevails in a jury trial the amount he will have to pay may far exceed any amount paid at an early stage in the dispute. Despite the fact that manufactuers pay their lawyers on an hourly basis and it is costly to allow the defense lawyer's meter to continue running. Despite the enormous costs of expert witness support, despite the diverted employee time entailed in the discovery process, and other costs of the system.

The gamesmanship of litigation neutralizes the incentives for speedy dispute resolution. Even where defendants propose early and reasonable settlements, plaintiff's counsel may read such an offer as a signal that the defendant is hiding the proverbial smoking gun and thus a litigation strategy should be pursued. Further, despite all the costs of litigation, defendants seek delays to gain tactical advantages over injured consumers who are faced with accumulating medical bills, lost wages, and other costs in order to force plaintiffs to settle cheap.

For more than 6 years now we have heard manufacturers arguing that Federal legislation was needed to reduce transaction costs. Yet, the proposals they championed did not address the underlying

inefficiencies of the legal system. Rather than provide alternatives to the litigation game, the various bills would only have made it more difficult for victims to receive adequate compensation for their injuries.

Under title II of the Danforth proposal, manufacturers would enjoy the vast benefits of avoiding the huge expenses that their attorneys frequently create in defending lawsuits. In addition, manufacturers would only be liable as payors of absolute last resort for economic losses, since the plaintiff's collateral benefits would be tapped first. Further, the manufacturer would escape all claims for nonpermanent dignitary losses, regardless of the severity of plaintiff's injuries.

Manufacturers would also escape all claims for punitive damages. Finally, manufacturers would obtain greater certainty of results since they would never have to pay more than $250,000 for victims' more permanent noneconomic losses and would not face the jury's scrutiny.

Despite these limitations on recoveries for victims, the opportunity for speedy compensation without protracted litigation would prompt victims to pursue title II settlements. While we have great concerns about the one-sided discovery of title II and other operational problems, as outlined in our testimony. On balance, we believe this system would work as a positive alternative but not as a substitute to litigation.

Though we believe that the incentives in title II would encourage most victims to initiate settlement proceedings, there will be others with catastrophic and severe losses who should be allowed to pursue full compensation through the tort system. We fear that if the tort system is loaded up with anticonsumer provisions like caps on pain and suffering and punitives, the balance of title II would be lost and manufacturers would be encouraged to reject settlement offers and thereby funnel consumers into a harsh and restrictive court system.

Senator KASTEN. Thank you for your testimony.

Before we go to our next witness, I would like to make an announcement. We have been in the process of negotiating with the ranking member, the Senator from South Carolina, other members of the committee, with the Secretary of State and the Republican majority who are meeting right at this moment in the Capitol, members of the Finance Committee and others in terms of trying to figure out how we are going to proceed with this hearing.

I just want to announce that we are going to have panel IV follow panel II, which will mean that the Carrico panel will be following the Schwartz/Owen panel. We will go forward now with the last witness on this panel, and then Mr. Schwartz and Mr. Owen. We will then go to Mr. Carrico, Few, et cetera, and then conclude this afternoon's hearing with panel V, beginning with Mr. Finch.

In that way we will go through the entire hearing today. There will be no reason for anyone to be held over tomorrow, and this meets the needs and the requirements of other members of the committee.

The next witness on this panel is Pamela Gilbert, staff attorney for U.S. Public Interest Research Group.

Ms. GILBERT. Thank you, Mr. Chairman. We are also very pleased to have been asked to submit testimony before this committee on this very important issue today. Due to the time problem this morning I did not prepare an oral statement and will rely on our written testimony.

I would also like to associate myself with the remarks of my three colleagues on this panel and would be very happy to answer any questions that you might have. Thanks.

[The statement follows:]

STATEMENTS OF JOSEPH GOFFMAN, PUBLIC CITIZEN'S CONGRESS WATCH; PAMELA GILBERT, U.S. PUBLIC INTEREST RESEARCH GROUP; LINDA LIPSEN, CONSUMERS UNION; AND GENE KIMMELMAN, CONSUMER FEDERATION OF AMERICA

INTRODUCTION

Thanks to Senator Danforth's efforts, expedited settlement of product liability claims has become the focal point of federal legislation. Although many proponents of legislation have concealed an anti-consumer agenda behind pleas for uniformity and cries of crisis, Senator Danforth has succeeded in addressing the legitimate need to streamline and reduce the systemic costs of product liability litigation. There is no question that swift, out-of-court resolution of most product liability claims, as proposed by Senator Danforth, is an essential component of legislation designed to increase the efficiency and fairness of the tort system.

Unfortunately, we must take issue with a number of Senator Danforth's tort law revisions. Even if the Danforth claim settlement system were adopted, consumer's interest both in full recovery for devastating injuries and in adequate financial punishment for those guilty of egregious commercial behavior would be undermined by arbitrary caps on court-awarded pain and suffering and on punitive damages. However, we reserve our most vehement objections for the entire package of victim-bashing tort law changes proposed by Senator Kasten.

I. THE KASTEN SUBSTITUTE

A constructive debate over how to improve the equity and efficiency of state product liability law has been polluted by the Reagan Administration's tort "reform" proposals, encompassed in Senator Kasten's substitute amendment to S. 100. By limiting pain and suffering and punitive damages to $100,000 per injury, the Kasten substitute would penalize the most seriously injured consumers by dramatically undercompensating them for the loss of their limbs, reproductive organs or dignity caused by defective products. The same cap on recovery would reward the most malevolent commercial behavior—reckless, willful, knowing or intentional manufacture, design or marketing of dangerously defective products—and thereby decimate marketplace incentives to produce safer products. Adding insult to injury, the Kasten substitute's extreme limitation on joint and several liability would leave innocent victims, rather than defendants found liable for making or selling defective products, responsible for all the uncompensated medical expenses, lost wages, and pain and suffering attributed to insolvent or legally immune wrongdoers.

Finally, in a policy choice that could only be characterized as bizarre, the Kasten substitute would require the reduction of judgments by and collateral benefits received by a plaintiff. As a result, a host of private and public sources would be called on to subsidize the costs of injuries caused by wrongdoers.[1]

Ironically, proponents of the Kasten substitute are the very same people who have for years argued that federal legislation is necessary to provide uniformity and consistency, not to eliminate victims' rights to recover for injuries caused by defective products. As we feared and warned all along, many of these enthusiasts for federal legislation are driven more by a desire to keep the profits resulting from the sale of defective products in the pockets of producers and distributors, and out of the pockets of injured consumers, than by an interest in uniformity or fairness. Contrary to the Kasten substitute, we believe the way to improve the tort system is

[1] The Kasten substitute also contains an expansive formulation of the "state-of-the-art" defense that would both import negligence issues into the product liability area and place the risk of supposedly unknowable dangers squarely on consumers rather than on those responsible for putting "unknowable" dangers in the marketplace.

through saving systemic costs by ensuring swift, adequate compensation for individuals injured by dangerous, defective products.

II. THE DANFORTH SETTLEMENT SYSTEM

The Danforth substitute would create a system for inducing rapid settlements of victims' claims that we believe to be fair, efficient and conducive to just results. Adoption of the settlement provisions in the substitute would represent a major breakthough in the ability of consumers injured by dangerously defective products to secure adequate recoveries for their injuries.

A. The incentives

The Danforth settlement process rests on a carefully balanced set of trade-offs and concessions by both victims and manufacturers. The opportunity for expeditious recovery of out-of-pocket expenses in addition to an amount for permanent noneconomic losses would actualize victims' powerful, already-existing incentives for securing early recoveries, thus prompting them either to initiate settlements themselves or accept those offered by manufacturers. At the same time, manufacturers, whether as settlement-initiators or as offerees, would enjoy the equally vast benefits of avoiding the huge expenses their attorneys frequently create in defending against lawsuits. In addition, manufacturers would be liable only as payors of absolute last resort [2]—no matter how great their culpability—for victims' economic damages. Similarly, manufacturers would escape all claims for transitory pain and suffering no matter how severe or long-lasting the victim's pain and distress. Finally, manufacturers would also gain the protection of an absolute limitation of $250,000 on victims' recoveries for their non-economic losses no matter how devastating these might be.

The rationality of this settlement structure goes well beyond even the crucial symmetry of these offsetting benefits and concessions. Underlying this balance of concessions are two critical elements. First, the settlement structure would function within the framework of the current substantive legal standards for product liability. These standards would provide both the core of an appropriate definition of the class of persons who would recover through the settlement process (i.e., those injured by dangerously defective products) and the critical incentive for manufacturers to settle victims' justifiable claims. Under the settlement provisions, a manufacturer would be free to reject a claim or not offer settlement and then demonstrate in a subsequent tort action either that its product did not cause the victim's injury or that the product was not dangerously defective. Consequently, a manufacturer would not be compelled to settle with an unfairly broad group of claimants, but would be compelled to compensate those injured by its dangerously defective products. Second, and most significantly, financial benefits would flow only to manufacturers who offered to settle disputes expeditiously.

In contrast, across-the-board alterations of the tort system advocated by the Reagan Administration, Senator Kasten and others—blanket imposition of a negligence standard, caps on recoveries or wholesale expansion of defenses like "state-of-the-art"—would undermine both the rationality and workability of any system designed to expedite settlements. Changes such as these would provide manufacturers an irresistible temptation to reject settlements for the purpose of challenging claimants in a tort system rendered vastly more favorable to manufacturers by precisely these changes. As a result, many consumers injured by dangerously defective products would simply not receive adequate settlement offers.[3]

B. The penalty

Section 207(b) provides that if a manufacturer lost a civil suit after rejecting a settlement claim, it would have to pay additional damages equal to 25 percent of the

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[2] This element of the settlement system represents an especially difficult concession for consumers, since it would spare those responsible for injuries the full costs of the injuries they caused. However, the concession may be justified in a settlement system of the sort proposed here.

[3] Even if the penalties provided for in section 207(b) were retained, they would not likely offset across-the-board changes favorable to defendants in the tort system. First, the threat of such penalties would be substantially vitiated by the extent to which such changes both increased the likelihood that defendants would prevail in the tort system and lessened the financial cost of losing a tort action. Second, as discussed below, the current system effectively generates a host of incidental but substantial penalties for manufacturers that postpone or reject settlements, yet the current system does not appear to produce early settlements. *See, e.g., Insurance Services Office Product Liability Closed Claim Survey* (1977) ("ISO"), p. 98, Tables 15-3 and -4.)

judgment, the compensatory portion of which would not be reduced or capped in any way, plus interest, at one percent per month. Such a financial penalty would be absolutely indispensable to ensuring that product manufacturers responded rationally to the benefits of settling a justifiable settlement claim, rather than yielding to the temptation to profit from the delay of a protracted lawsuit. In fact, this penalty must be regarded as the minimum necessary, since the current system already imposes, de facto, substantially penalties on manufacturers who do not settle their cases early in the proceedings. Today, manufacturers facing product liability lawsuits risk suffering judgments after trial that are many times greater in size than any settlement they would pay early in the litigation. In addition, the longer litigation proceeds, the greater the amount manufacturers must pay their defense attorneys in fees and expenses and the greater the costs they must bear in diverted employee time and energy inevitably entailed in the discovery and defense process. Nevertheless, there is evidence that despite these financial incentives, lawsuits are not settled early.[4]

Moreover, an individual claim presented to a manufacturer would not arise in a closed economic system. The claim itself along with any potential penalties connected with it could be dwarfed by a number of other economic factors at work on the manufacturer's decision-making. For example, a manufacturer may decide to resist all claims against its mass-market products for fear that an alternative course would unleash a flood of claims against it. Any penalty for failure to settle must, therefore, be sufficient to account for, and offset, countervailing financial incentives such as these.

III. TITLE III'S LIMITATIONS ON RECOVERY FOR SERIOUS HARM

Despite offering more efficiency and equity through its expedited claim-settlement system, the Danforth substitute falls short of meeting consumers' need for full recovery of losses through the litigation process. Section 303's $250,000 cap on recovery for pain and suffering, following rejection of a settlement offer, would inappropriately penalize a small group of severely injured plaintiffs, without significantly augmenting the settlement incentives inherent in the balance of the Danforth system. Removal of this cap would preserve settlement incentives without eliminating victims' rights to full recovery through litigation.

A. Arbitrary injustice

Although pain and suffering may be difficult to quantify, it is nonetheless real, compensable loss that should be fully available to injured consumers who prevail in product liability lawsuits. Recovering for injuries that involve disfigurement or loss of bodily, sensory or mental function—a slightly broader list than "dignitary losses" under Title II of the Danforth substitute—should not be arbitrarily limited in the tort system. Payment of no more than $250,000 to burn victims and individuals who lose their arms, legs, eyesight, mental ability (*i.e.*, through brain damage) or reproductive capacity does not come close to compensating them for their full compensable loss. Consider the injustice of a $250,000 cap on pain and suffering in the following real-life situations:

A five year old Arizona girl was severely burned over 82 percent of her body when a defective Coleman Camp Stove spewed fuel 6 to 8 feet into a smoldering campfire pit, igniting her clothing. This child's life has been, and will continue to be, devastated by the 15 operations she has already undergone and the 30 to 35 more doctors anticipate she will need. While hospitalized for these severe burns, she received extensive antibiotic treatment to fight infections. This treatment resulted in auditory nerve damage and partial deafness. *Haddix* v. *Coleman Co.*, Ariz., Prima County Superior Court, No. 212296, June 21, 1985.

A 26 year old Kentucky coal miner lost one eye and his sense of taste and smell, and developed permanently disabling epileptic seizures when a defective mining machine trapped him in a 30 inch seam of coal. *Shackleford* v. *Joy Manufacturing Co.*, U.S. Dist. Ct. E.D. Ky. No. 82-9 December 19, 1984.

A four year old girl received severe third degree burns over 48 percent of her body, including her face and neck, when her inadequately tested, insufficiently flame-resistant flannel shirt was ignited by a butane lighter. The fingers of her right hand were amputated, she has had to live through multiple surgeries and skin grafts, she has bone infections and will need to undergo many additional surgeries, including reconstructive operations. *Nelson* v. *F.W. Woolworth Co.*, U.S. Dist. Ct., W.D. Wis., No. 81-C-643-S, November 19, 1984.

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[4] *See* n. 3.

An 8 month old Michigan infant suffered a fractured skull and brain damage resulting in cerebral palsy and quadriplegia when his defective baby carseat failed to protect him during an automobile accident. *Estes* v. *Collier-Keyworth*, Mich., Wayne County Circuit Court, No. 81 131 631 NI, March 19, 1985.

A 19 year old California power press worker had his hands flattened like a crushed sandwich, with blood vessels and tissues oozing out the sides like jelly, when a power press that lacked guards and warnings slammed down and locked, smashing the boy's hands until the press was pried open about eight minutes later. *Morris* v. *Finer Filler Products Inc.*, Cal., Alameda County Superior Court, No. H-65523-3, March 27, 1985.

It is important to recognize, moreover, that the most severe injuries, which carry a large price tag in the tort system, represent a very small percentage of product liability claims. According to the Insurance Services Office Product Liability Closed Claim Survey, 91 percent of the product liability claims or settlements that result in some payment to the injured party involve no permanent disability.[5] While a $250,000 cap may save manufacturers and product sellers some money, it would deny the small percentage of severely injured consumers adequate recovery for their losses.

If the cap on recovery were removed from section 303 of the Danforth substitute, the bill's strong incentives to settle claims expeditiously would be preserved without penalizing consumers severely injured by defective products. Individuals who sustain severe injuries already have overwhelming incentives to settle claims quickly so they can meet the pressing need to pay for necessary health care, rehabilitation and change-of-lifestyle costs and put unfortunate experiences behind them. According to the Insurance Services Office, 96.5 percent of product liability claims are resolved out of court—only 3.5 percent result in a court verdict![6] Clearly the presence of a cap on pain and suffering would add little to plaintiffs' powerful settlement incentives and its elimination would in no way affect or undermine these incentives. Only those with the most extreme and severe injuries would find these settlement incentives, without the cap, insufficient to entice them to avoid the stresses, uncertainties and delays of full-blown litigation. Consequently, only those whose injuries truly justified non-economic awards of greater than $250,000 would be affected by the cap—and that effect would create nothing but an unnecessary and unjust penalty.

Similarly, elimination of the section 303 cap on pain and suffering would not reduce manufacturers' or product sellers' incentives to settle claims expeditiously. Under the Danforth substitute, defendants who agreed to settle disputes quickly would reduce their liability by the value of all collateral benefits paid or payable to claimants (i.e., life, health, accident or disability insurance, workers' compensation, welfare or Social Security benefits) whether or not the settlement offer were accepted. In addition, when injured parties agreed to work out a settlement, defendants would not be liable for any pain and suffering, apart from permanent, severe impairment—and liability there would be limited to $250,000. Finally, manufacturers and product sellers would face a potentially stiff financial penalty under section 207(b)(1) for refusing to settle claims that resulted in successful product liability lawsuits for injured parties. These elements of the Danforth substitute would provide consistent, ample incentives for all parties to settle there product liability disputes. It would be unnecessary to eliminate full recovery for pain and suffering to ensure settlement of most claims and grossly unfair to those few victims whose non-economic damages actually exceeded $250,000.

B. Dangers of Inflexible Caps

The caps imposed on pain and suffering awards in Title II and III of the Danforth substitute raise important public policy concerns. Even if there were legitimate reasons for restricting tort recovery, which we do not believe there are, it is essential that any cap on recovery demonstrate flexibility over time to include changing economic conditions. If a particular limit on recovery at one point in time is considered equitable, it must be adjusted automatically to reflect basic changes in economic and social conditions over time—ranging from average wage changes to altered productivity and longevity.

Take the case of a 35-year old who suffered quadriplegia in 1975 as the result of injuries caused by a defective product. According to the Insurance Services Organization, the average 35-year old quadriplegic victim would have received a $505,000 (trended) award in 1975.[7] The award probably would have included about $63,000

[5] ISO, p. 113.
[6] ISO, p. 95.
[7] ISO, p. 116.

for medial expenses, $190,000 for lost earnings and other economic loss, and approximately $253,000 for pain and suffering—approximately the section 303 cap in the Danforth substitute.

Now, assume the very same injury occurred to the same type of person in 1984. To treat this victim like the 1975 victim, the 1984 victim should receive an award of $1,082,000, given the Insurance Services Office estimate that pain and suffering equals approximately economic loss for this type of award,[8] a 90 percent growth in median household income between 1975 and 1984 (from $11,800 to $22,400)[9] and a 185 percent increase in hospitalization and other intensive treatment costs during this same period.[10] (See Table 1.) This increase does not include increased life expectancy (5 percent)[11] or any social changes that occurred during this nine year period. Clearly, a $250,000 cap on pain and suffering in 1975 that may have been considered reasonable in the context of a half-million dollar settlement or verdict, would fall far short of meeting the equivalent economic and social needs of victims today. To maintain equity over time, a capered system of recovery must automatically take economic and social changes into account. The Danforth substitute fails to address this issue.

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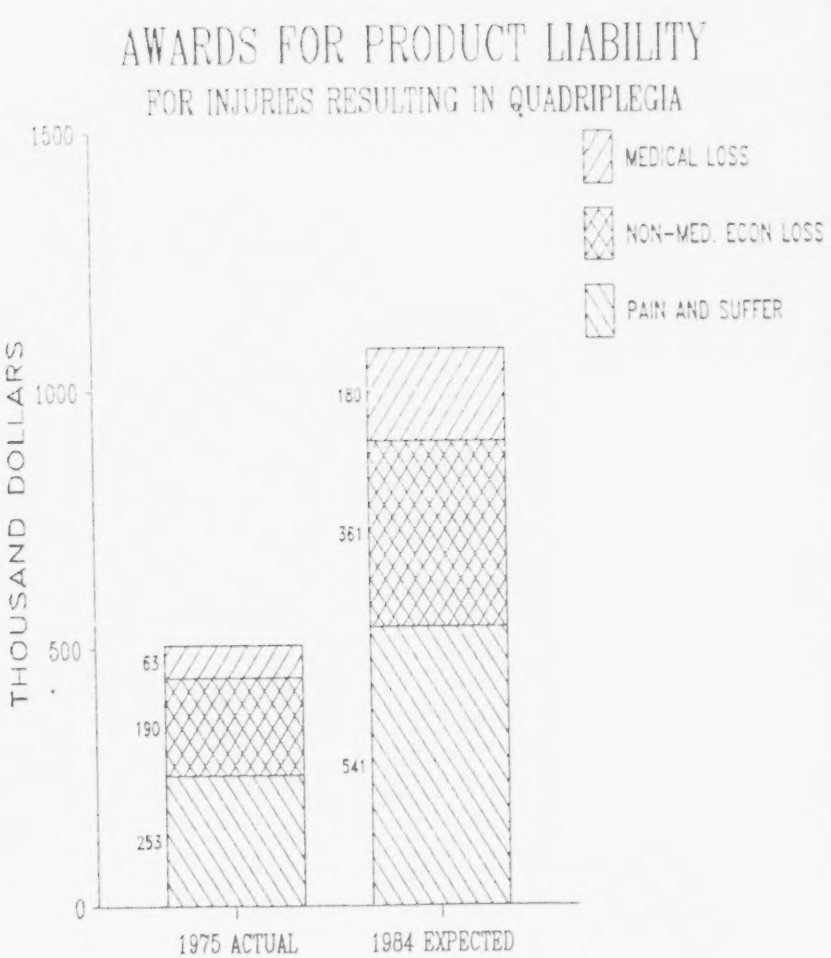
[8] ISO, p. 46.

[9] U.S. Department of Commerce, Bureau of Census, *Statistical Abstract of U.S.* (1986), Table 742.

[10] *Id.* at Table 797.

[11] *Id.* at Table 16.

TABLE 1.


AWARDS FOR PRODUCT LIABILITY
FOR INJURIES RESULTING IN QUADRIPLEGIA
MEDICAL LOSS
NON-MED. ECON LOSS
PAIN AND SUFFER
THOUSAND DOLLARS
1500
1000
500
0
63
190
253
180
361
541
1975 ACTUAL
1984 EXPECTED

IV. PUNITIVES

Punitive damages would be inappropriately restricted by the Danforth substitute. The importance of punitive damages is evidenced by many well known cases.

In the 1970's, the Ford Motor Company made Pintos with gas tanks that exploded in collisions at moderate speeds. Internal Ford documents proved that Ford knew: (1) that its Pinto gas tanks were likely to explode, (2) that those explosions were likely to kill and severely burn people, and (3) that the gas tanks could be fixed and the deaths and burns prevented for between $4 and $8 per car. Internal Ford documents also revealed that Ford had prepared a cost-benefit analysis demonstrating that the costs of making this improvement outweighed the benefit of avoiding deaths of Pinto passengers. Thus, Ford did not make the improvement and hundreds of people were killed and burned who could have been saved for between $4 and $8 per car. *See Grimshaw* v. *Ford Motor Co.*, 174 Cal Rptr 348 (Cal Ct. App. 1981)

Richardson-Merrell (RM) began distributing a drug called MER/29 in 1960. MER/29 was supposed to reduce cholesterol, but did not. It did, however, cause cataracts. Before marketing the drug, RM conducted six tests which showed that MER/29 caused cataracts and other abnormalities in mice, but RM lied about the tests in reporting to the FDA. Doctors and researchers soon began reports to RM that that patients and animals consuming MER/29 were suffering adverse side effects, but RM continued to market the drug, and continued to advertise it as safe. Only after FDA officials made a surprise visit to RM laboratories and confiscated its animal experiment records did RM withdraw MER/29 from the market. *See Toole* v. *Richardson Merrell*, 251 Cal. App. 2d 689 (1967)

Not surprisingly, under present law both Ford and Richardson-Merrell have had to pay significant punitive damage awards. Under the Danforth substitute, opportunities for punishing corporations for such wholesale disregard for consumers health and safety would be sharply limited. To deter manufacturers and others from acts of corporate misconduct and to preserve existing safety incentives, the threat of punitive damages must be maintained in full force.

Section 306 generally would: (1) cap punitive awards at twice the amount of compensatory damages; (2) establish a trifurcated trial procedure, increasing legal fees and delays in obtaining punitives; (3) transfer the power to determine the amount of a punitive award from the jury to the judge: (4) establish compliance with government standards as an absolute defense to punitive damage awards; and (5) elevate the burden of proof to a clear and convincing standard of evidence making it more difficult for consumers to obtain punitives.

A. The punitive damage cap

Limiting punitive damage recoveries to twice the amount awarded for compensatory damages would eviscerate an immensely useful tool for curbing outrageous corporate conduct. The potential for large punitive damage awards that cannot be calculated in advance serves to remind manufacturers that they must pay careful attention to the safety consequences of their actions or risk facing future financial ruin.

Additionally, and more importantly, this provision is inherently arbitrary and bears no relationship to the amount of punishment actually required for discouraging manufacturers from placing profit considerations over consumer safety and health. This flaw is especially obvious where the plaintiff's injuries were non-catastrophic, but were caused by a manufacturer whose action exemplified an almost vindictive contempt for the public good—cases, for example, where manufacturers destroy evidence of product dangers or engage in other corporate cover-ups. In order to promote the goals of punishment and deterrence, the factfinder should be free to examine the degree of reprehensibility of the manufacturer's conduct as the facts command, rather than be forced into a legislative straitjacket.

B. Procedures

Under section 306, if a plaintiff wishes to pursue punitive damages, he or she would face three separate proceedings: the first to determine whether compensatory damages should be awarded, the second to determine whether punitive damages should be awarded, and the third to determine the amount of punitives. This trifurcated system would increase the cost to consumers of bringing a punitive damage claim and may discourage plaintiffs from investing the time, energy and expense to prosecute socially deleterious conduct.

Accordingly, plaintiffs must first prevail on their liability claim and then proceed to another trial where much the same evidence would be presented on punitive damages. Under current law, judges, upon motion, may separate these proceedings

to prevent undue prejudice. Since courts already have the authority to separate these functions, it is unnecessary to require this procedure by statute.

Pursuant to section 306(d), the power to determine the amount of punitives would be transferred from jury to judge. In most states the amount of punitive damages is left to the discretion of the jury, which considers the seriousness of the defendant's conduct. Courts have vested in the jury wide discretion to assess the amount of punishment because juries are best suited to act as the conscience of the community.

The transfer of authority from jury to judge is wholly unnecessary as a means to control unfair application of punitive awards. Judges already employ methods for reducing any potential that punitive awards would be applied unfairly. Judges are increasingly scrutinizing and reducing awards, reversing inappropriate awards on appeal or using procedural rules to eliminate injustice against manufacturers or product sellers.

Moreover, this provision and the one establishing a formula for determining the amount of punitive damages is Constitutionally suspect. The Seventh Amendment of the U.S. Constitution provides in part that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." As Secretary of Commerce Malcolm Baldridge explained to the Cabinet Council on Commerce and Trade: "The role of the jury, as tempered by the authority of the judge to reduce the amount of the award, is made central to our judiciary system by the Seventh Amendment to the Constitution."

C. Compliance with government safety standards as a defense to punitives

Section 306(c) would allow manufacturers and product sellers to be shielded from punitive damages where they establish compliance with Federal government safety standards, statutes or specifications. This absolute bar to punitives is totally unjustified. Under present law, compliance with a federal standard can be presented as evidence of due care. However, it should not be given dispositive weight.

Government safety standards do not necessarily establish an acceptable level of safety, and in fact, may only establish a modest safety floor. This provision undercuts safety incentives by shielding manufacturers from a punitive award just because they may have complied with a hopelessly outdated and/or under-protective standard. Moreover, this defense may actually dilute manufacturers' commitment to ensuring safety themselves, since they would not be punished for failing to take adequate safety precautions where a government standard required far less care.

Compliance with government standards is highly probative of the manufacturer's conduct and therefore is an appropriate factor for a jury to consider in a punitive damages case. However, such compliance with government standards should never serve as an automatic bar to punitive liability.

V. ADJUSTMENTS TO THE SETTLEMENT SYSTEM

A. Rationalizing the class of victims covered

Given the admirable soundness of the settlement structure, all that remains is the addition of certain features that would enhance its fairness by expanding the class of victims included.

1. Toxic harms.—In testimony submitted to this Committee on February 27, 1986, we described the often insuperable difficulties faced by victims of toxic injuries who attempt to obtain compensation for their injuries. In that statement we recommended changes in tort law that would overcome the inadequacies of the current system. It is essential that the settlement system be expanded to ensure that toxic injury victims can obtain adequate settlement of their claims. Since the universe of claimants who could hope to participate in settlements is, by definition, limited by the substantive and procedural standards of the current tort system, the only way to provide coverage for toxic injury victims in the settlement system is to remove the inappropriate and arbitrary hurdles which obstruct toxic tort plaintiffs in the civil justice system. See *infra.*, Section IX.

2. Unidentifiable manufacturers.—Section 203(c) properly permits victims who are unable to identify the manufacturers of the products that injure them access to Title II. Unfortunately, this access is restricted only to those with long-latency injuries. Others, such as people injured by pesticides recently sprayed in a public park, whose injuries manifested themselves immediately, would continue to be barred from Title II if they could not identify the maker of the product that injured them. This distinction is utterly unjustified. While it is less likely that victims of short-latency injuries would be unable to identify the product manufacturer, they should

nevertheless be given the opportunity to show that they are legitimately incapable of discovering the manufacturer in order to avail themselves of section 203(c).[12]

3. Statute of repose.—Section 209 imposes an absolute bar on claims brought for injuries caused by capital goods 25 years after date of first delivery. There is simply no reason to exclude the tiny fraction of victims of 25-year-old products from participation in Title II, particularly when certain products have useful, safe lives of greater than 25 years.[13]

B. Fairness of title II procedures

1. One-way discovery.—To make a "valid" claim for the purposes of settlement, a claimant must present the manufacturer with a substantial quantity of information and material normally turned over only as part of the litigation discovery process. In addition, in any ensuing arbitration of litigation, the claimant is effectively bound by the evidence and any arguments or theories contained or implied in the information produced. In contrast, the manufacturer is required to reveal nothing to the claimant either in advance of the arbitration proceeding or or in conjunction with its rejection of the claim.

This is both inequitable and unnecessarily disadvantageous to claimants. In the case of arbitrated disputes as to the amount of recovery claimed, victims would be saddled with a substantial handicap. While a manufacturer would be familiar with the essential elements of the case the victim was going to present to the arbitrator, the claimant would know little of what the manufacturer intended to demonstrate or argue. This disadvantage could be particularly severe in a dispute as to the value of the victim's non-economic loss, since the arbitrator would be limited to choosing between each party's last offer. To correct this imbalance, the claimant should be informed of the basics of the manufacturer's case and of its previous claims history before the arbitration begins and before the victim submits his or her final offer to the arbitrator.

Similarly, if a manufacturer rejected a claim outright, a victim would, in any ensuing litigation against the manufacturer, be virtually "locked in" to his or her own case, while the manufacturer would be free to mount any defense it chose. At the start of the litigation, the claimant would have no idea of the manufacturer's basis for rejecting the claim in the first place. As a remedy to this disequilibrium, and to foster efficiency in subsequent litigation, manufacturers should be required to state in some detail their reasons for rejecting a claim and to produce specific evidence supporting these reasons. Like the rule for claimants, manufacturers' cases in ensuing litigation should be confined to the issues and evidence they present when rejecting claims.

2. Validity of a claim.—Section 204(e) provides that a claimant's failure to comply with a manufacturer's request for information would render the claim invalid. Since the manufacturer's right to request information from a claimant is rather broadly defined, this provision would enable the manufacturer unilaterally to bar a victim's claim from attaining "valid" status simply by submitting an ongoing series of information requests. In order to prevent manufacturers from requesting information in bad faith attempts to create delay or discourage claimants from persisting, a valid claim must be defined independently, at least in part, from the manufacturer's right to request information.

3. Method of payment.—Section 205(b) permits a manufacturer to choose, as the means of settlement of a claim, an enforceable promise of payment for economic loss on an "as-incurred" basis. Victims, however, may wish to resolve their claims without having to incur an ongoing dependence on payments made essentially at the discretion of the manufacturer. Consequently, victims should be entitled to choose the method of payment of a settlement claim.[14]

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[12] Obviously, to make this provision meaningful, this rule must be adopted in Title III for all product liability actions.

[13] We incorporate by reference our testimony opposing such a provision submitted to this Committree on February 27, 1986. Should the Committee nevertheless feel compelled to adopt such a provision, we consider it vital to alter it in two ways. First, the age of a product should create no more than a rebuttable presumption that its use had surpassed its useful safe life and should not be an absolute bar to recovery. Second, for the age of the product to be truly relevant it must be measured from the date of first use, not merely date of delivery.

[14] To enhance the ability of injured consumers to seek settlements in Title II, the Danforth substitute should require manufacturers to inform consumers of their rights under Title II at the time of purchase.

VI. UNDERMINING OF JOINT AND SEVERAL LIABILITY

Section 307 would seriously undermine the ability of injured victims to obtain full recovery for both the economic and non-economic losses resulting from their injuries. Under subsections (b) and (c)(1), the court would determine the "separate percentages of the total responsibility [i.e., for an injury] attributable to all parties . . . and any nonparties responsible to any extent for the harm" and award compensatory damages to the victim according to this determination. This provision would reduce the amount of compensation that the parties before the court would have to pay the claimant by whatever amount that was found to be attributable to nonparties. If the nonparties included persons or institutions that were for some reason immune from suit—or if "nonparties" was also interpreted to include impersonal forces of nature—then the victim would be left to bear any resulting shortfall in his or her economic and non-economic recovery.

This represents an irrational policy. Under section 307(a), the claimant's recovery would already have been reduced by whatever extent the victim had been found responsible. Although innocent of any responsibility for the balance of the harm suffered, the victim, and not those found to be liable as wrongdoers, would be forced to bear the extra costs of injury added by the absent, responsible nonparty. Shifting these costs to the innocent plaintiffs is patently unfair.

To aggravate this inequity, section 307(c)(2) would put the burden of collection on the claimant. Rather than permit the victim to recover full compensation from one defendant, and permit that defendant to secure contribution from other defendants, section 307 would limit the victim's recovery from any one defendant to the percentage of fault of that defendant. Only after pursuing all other defendants and coming up short, could the plaintiff petition the court to allow further contribution from the defendants who had paid. Again, it would be the innocent victim, and not any one of the established wrongdoers, who would be forced to bear the expense and burden of further court proceedings as well as the delay in recovery. These are costs which simply should not be shifted from the wrongdoers to the victim.

VII. PROBLEMS WITH MULTIPLE CAUSES OF ACTION

One of the greatest problems in the Danforth substitute involves inadequate, inefficient resolution of disputes with multiple defendants. By barring all other lawsuits for the same injury when a Title II or Title III claim has been filed, and altering the doctrine of joint and several liability, the Danforth substitute could leave many injured parties only partially compensated or induce them to bypass this statute and file lawsuits against non-product manufacturer/seller defendants. Section 208(a)(1), 302(g) and 303(b) must be altered so that injured parties may consolidate all the claims in one lawsuit, where they may receive full compensation if they prove their case.

The following example illustrates the problem with the substitute:

Late one evening, a 21-year old man, driving past a disabled vehicle on the shoulder of the road, stops to aid an elderly woman driver change the flat, left-rear tire of her car. While the man is jacking up the car, a 17-year old driver, who has just gulped down six mixed drinks at a local tavern, loses control of his car while negotiating the sharp curve adjacent to the disabled vehicle, and slams into the good samaritan tirechanger, rendering him quadriplegic. In this state, the tavern owner may be liable for serving the liquor. Experts believe the drunk driver was 60 percent at fault, the tavern owner 10 percent at fault, the municipality 10 percent at fault for failing to provide adequate warning of the sharp curve, and the car manufacturer 20 percent at fault for designing a faulty steering mechanism. The drunk driver's insurance coverage is limited to $100,000, and the victim anticipates lifelong disability, with significant economic loss plus destroyed family, career and social expectations. This victim could avail himself of the settlement system under the Danforth substitute only with respect to the car manufacturer (the other potential defendants are not product manufacturers or sellers), and would be likely to recover out-of-pocket costs plus 20 percent (manufacturer's share of fault) of pain and suffering up to $250,000.

Given the nature of the injury, this would likely result in considerable under-compensation for pain and suffering. Even if the car maker were 80 percent at fault, the pain and suffering award could not exceed $250,000 under section 303(b) of the bill. So, the victim would have a financial incentive to bypass the federal product liability law, and file suit against the municipality, drunk driver and tavern owner under state law. If successful, the victim could receive full compensation, with the municipality and tavern owner picking up much more than their share of the award. The auto manufacturer, although more at fault than either the municipality or tavern

owner, may avoid paying even a penny (unless vulnerable either to impleader or suit for contribution—options that may be preempted under section 103(c) of the Danforth substitute).

Whenever injuries involve both product liability claims and other legal rights—a common situation—the Danforth substitute would cause considerable confusion and inefficiency. In order to preserve the bill's settlement-inducing purpose, we believe injured consumers should be allowed to consolidate all claims pertaining to a particular injury under this federal statute. To increase the efficiency of the settlement process and assure full compensation, we believe that defendants found liable under section 303, rather than innocent victims, should be responsible for eliciting contribution from all other wrongdoers for their share of the award.

VIII. RECORD RETENTION

The availability of records enhances the potential for settling lawsuits. Additionally, where records are available, plaintiffs are more likely to catch witnesses who lie or stretch the truth, remind witnesses who forget, and replace witnesses who die, disappear or are beyond the reach of the court. The corporate document destruction phenomonon is exceedingly common and well—documented. (We incorporate by reference our testimony submitted to this Committee on Feb. 27, 1986).

S. 1999 contained more effective incentives for manufacturers to preserve documents and records than Section 310 of the Danforth substitute. The preservation of records under Sec. 310 appears to be triggered only by the initiation of a lawsuit or the rejection of a settlement offer under Sec. 205 or Sec. 302, where a "person has notice that he or she may be a party to a civil action." Sanctions against parties for destroying evidence where lawsuits or claims have been filed are already available, though courts are somewhat reluctant to impose penalties on parties who have not received requests for discovery.

Unfortunately, essential documents may be destroyed as part of a routine document destruction program long before the initiation of a lawsuit or before any party is on notice that there may be a claim or lawsuit filed. The substitute should retain S. 1999's requirement that documents be preserved for 25 years, to curtail document destruction programs which make it that much harder for plaintiffs to prove their cases.

The record retention provision is not the panacea for curing all the woes of the costly delay-producing discovery process and difficult problems of proof. This provision would not affect manufacturers' use of a host of privileges for avoiding or delaying information disclosure, or discourage the pursuit of protective orders which bottle up evidence, or cause manufacturers to admit facts already proven in prior lawsuits. Since the Committee is seeking to streamline the tort system, reforms that reach these delay-producing strategies must be adopted.

IX. TOXICS VICTIMS

Victims of toxic harms have a great deal more difficulty recovering from their injuries than do most other victims of defective products. We are disappointed that the Danforth substitute no longer addresses the problems that toxics victims face in the current product liability system.

The substitute does include at least one important improvement over its predecessor in the area of toxic torts. The new bill no longer excludes from the definition of "product" the following materials: "industrial waste, atmospheric pollutants, and water contaminants," and "tobacco or alcoholic beverages sold for human consumption." Section 102(12). This change will afford many people who have been injured by these products the opportunity to seek compensation for their injuries through the settlement and tort systems established in the bill.

However, merely including toxics victims within the scope of this legislation does not address the special problems that these victims have traditionally faced when seeking recovery through the courts. (In previous testimony we included a discussion of the obstacles to compensation that confront toxics victims and a proposal which would ease some of the burdens placed on these victims by the current ssytem. See our testimony before this Committee on February 27, 1986, Appendix A.)

People injured by exposure to toxic substances differ from most victims of product-related injuries for two primary reasons: (1) their diseases often take years to develop, and (2) the medical and scientific communities are still unsure about the cause and effect relationship between toxic exposure and many illnesses. These differences create many barriers to recovery not faced by most victims of traumatic injuries.

We propose a federal cause of action for victims of toxic exposure that would address four legal obstacles in current law: statute of limitations; evidentiary burdens; judicial reluctance to certify class actions; and proof of causation.

A. Statute of limitations

Under the statute of limitations established in both titles of the Danforth substitute (sections 203(e) and 308(a)), the two year time period for submitting a claim or a civil complaint does not begin to run until the claimant "discovered or, in the exercise of reasonable care, should have discovered *the harm and its cause.*" (emphasis added.) These provisions would allow many victims of toxic exposure who reside in jurisdictions with very restrictive statutory time limits to obtain compensation.

However, the substitute would reduce plaintiffs' rights in the thirteen jurisdictions that have the most protective statutes of limitation. Those jurisdictions begin the running of their statutes when the plaintiff knew, or should have known, of the harm, its cause *and that a cause of action existed.*

Since the victims of toxic exposure often do not become aware of their illnesses for many years, it may take them considerable additional time to connect their illnesses to exposure to a particular product. The Danforth substitute should adopt a statute of limitations that does not begin to run until the claimant discovers, or should have discovered, the illness, its cause, and the existence of a cause of action against an individual or entity that may be responsible. This would ensure that toxics victims who suffer from long latency diseases are given a fair opportunity to seek recovery.

B. Relevant evidence

Another major obstacle to compensation that toxics victims must overcome is proving that exposure to a product caused their injuries. Since the types of illnesses caused by exposure to hazardous substances—such as cancer, nervous system and organ damage, and genetic disorders—also occur among people who have not been exposed to toxics, plaintiffs, must often rely upon scientific studies to link their diseases to a product.

Some states have made it virtually impossible for toxics victims to prove causation by excluding from evidence all scientific studies that did not result from studying the parties before the court. This excludes from consideration by the court epidemiological studies, animal studies, toxicological studies, tissue cultures and immunological studies which relate to the cause of the injury but which were not derived from studying the plaintiffs themselves.

To provide injured parties a fair opportunity for recovery in each state, the Danforth substitute should establish a uniform evidentiary rule that would specify that courts should admit all evidence relevant to the issue of causation. Such a rule would be consistent with the definition of "relevant evidence" and the exceptions to the hearsay rule in Rules 401 and 803 of the Federal Rules of Evidence.

C. Class action certification

The special characteristics of injuries from toxic substances combined with the fact that many toxics suits are brought under new and untested theories of liability make toxic tort lawsuits extremely costly. To reduce transaction costs, the Danforth substitute should facilitate the consolidation of such lawsuits into class action proceedings. The bill should endorse granting class action certification in toxic tort cases where there are numerous plaintiffs with substantial similarities in their factual circumstances or liability theories, and where use of a class action would tend to reduce total litigation costs or expedite a decision.

D. Proof of causation

Victims of toxic exposure have great difficulty proving the cause of their injuries because of deficiencies in medical and scientific knowledge and because their illnesses also afflict people who have not been exposed to the same substances. One method of facilitating the proof of causation is to prevent premature dismissal of such lawsuits so that courts may hear all evidence pertinent to the issue of causation.

In many states, even after scientific studies are admitted into evidence, courts will dismiss a case for failure to state a claim because the plaintiff's experts have not proven conclusively the causal link between exposure and illness. A legal principle requiring certainty in establishing causation would preclude most toxics victims from recovery, since the best that can usually be shown in such cases is a strong probability that the product caused the illness.

The Danforth substitute should ensure that toxic tort actions are not dismissed prematurely because conclusive evidence as to causation is not available. Without

such a provision, defendants in many toxics cases will not offer settlements since they can be confident of prevailing in a civil action through a motion to dismiss. This would effectively preclude toxics victims from participating in the expedited claim-settling system.

To prevent exclusion of most toxic torts, the Danforth substitute should state that plaintiffs in a toxic tort federal civil action will be regarded as having made the showing needed to survive a motion to dismiss or a directed verdict on the issue of causation if they can show that: (i) the plaintiffs were exposed to hazardous substances in some manner; and (ii) the plaintiffs suffered death or the kind of injury, illness or disability which can be caused or contributed to by an exposure to such hazardous substances.

IX. INSURANCE REFORM

The Danforth substitute would provide many needed improvements to the tort system. The bill would not, however, solve the current and recurring problem of escalating costs and unavailability of insurance coverage. To solve the recurring "insurance carisis" would require a broad package of reforms of federal and state insurance laws. We endorse increased federal regulation of the insurance industry, as proposed to this Committee by the National Insurance Consumer Organization.

CONCLUSION

We urge the Committee tc build upon Senator Danforth's expedited settlement proposal, to develop an efficient, equitable product liability package. Consumers injured by all types of unreasonably dangerous, defective products—ranging from toxics to old machinery—must have an opportunity to settle their claims expeditiously, without giving up the opportunity for full compensation through litigation or the ability to discipline manufacturers and product sellers guilty of egregious behavior. In addition, we urge the Committee to consider federal regulation of insurance practices, to help stabilize insurance premiums.

Senator KASTEN. Pam, thank you very much.

I had a question, and I think maybe many of you have heard either yesterday or today Senator Pressler talk about punitive damages and whether in fact they should be insured or insurable and whether in fact punitive damages should be covered in the way that they are.

Do any of you have comments on what for lack of a better word I would call for right now the Pressler theory, that insurance should not cover punitive damages? Why do we not start with Mr. Goffman—because of the nature of punitives they should not be covered by insurance. If you are not familiar with the argument, then just simply say so, but I think that if you were here yesterday or today you will understand the basic thrust of my comments.

Mr. GOFFMAN. Well, I will answer only to the extent that I am familiar with the argument. I think that there is a lot to be said for that kind of restriction on the insurability of those damages. I understand that almost half of the jurisdictions currently ban insurance against the award of punitive damages. We have a lot of sympathy with that position, because it would be a way of passing the incentives and the sanctions directly to the wrongdoer.

Senator KASTEN. Mr. Joseph.

Mr. JOSEPH. The chamber does not have an official position, but I would just comment that the perception that Assistant Attorney General Willard made about a lawyer, a plaintiff's lawyer today who did not pursue punitive damages would almost be in pursuit of malpractice. A call I got yesterday from a chamber member indicated how they could be blackmailed.

A lawyer of an apartment building owner called up and wanted to know if they had liability insurance. If they had a lot of it, they

will sue them for a lot because the insurance company would handle it. And if they do not have the insurance, let them know and they will not sue them for too much because someone fell down in a building.

And it is human nature, I think, for some of these people, if they know that the deep pocket is even potentially deeper, they will pursue it.

Senator KASTEN. Mr. Connor.

Mr. CONNOR. If I understand the question, dealing narrowly with the issue of whether punitive damages should be insurable, it is a question which NAM has never addressed. It is my understanding today that punitive damages are not insurable in the majority of the States. We have certainly over the years made other proposals with respect to punitive damages and have supported the various measures which you, Mr. Chairman, have advanced. But we have never examined, to my knowledge, the question of insurability.

Senator KASTEN. Mr. Kimmelman.

Mr. KIMMELMAN. I just agree with Mr. Goffman. Our position is basically that we do not see why they should be insurable.

Senator KASTEN. Mr. Hitchcock.

Mr. HITCHCOCK. Senator, I think small companies and big companies are already paying those punitive damages even if they are an innocent company. Our insurance has gone up 1,500 percent and we have not had a claim against that excess insurance, so I think we are already seeing those costs being passed on to everybody in general, whether they are insured or not.

Senator KASTEN. Ms. Lipsen.

Ms. LIPSEN. Punitive damages are only awarded in the most egregious cases and, because of that, although we do not have an official position on whether punitive damages should be insured, I would also associate myself with Mr. Goffman's remarks. I do not believe that they should be subject to insurance.

Senator KASTEN. Ms. Gilbert.

Ms. GILBERT. We have the same problem. We do not have an official position on it, but as a personal matter I do not believe that they should be insurable.

Senator KASTEN. I was not meaning to put words in anyone's mouth. No one has an official position on this. It was just a theory that we started talking about yesterday, but I just thought that this would be an opportunity to have you reply to this.

Let me say thank you to each of the members of this panel. I apologize for the time constraints that we are all operating under, but I appreciate your testimony here today.

The next panel will include Mr. Schwartz and Mr. Owen. Our first witness on this panel is Mr. Victor Schwartz, counsel to the Product Liability Alliance.

Mr. Schwartz.

STATEMENTS OF VICTOR E. SCHWARTZ, COUNSEL, ON BEHALF OF THE PRODUCT LIABILITY ALLIANCE; AND DAVID OWEN, SCHOOL OF LAW, UNIVERSITY OF SOUTH CAROLINA

Mr. SCHWARTZ. If we hear some requests from some of the Senators to further delay this, you might show a TV tape of both of us

over the past 5 years and the age factor with both of us. In fact, earlier I felt some objection where someone from one of the groups asked if I would sit on the table with "products near extinction."

The Product Liability Alliance's purpose in part is to try to assemble a very wide variety of points of view in the business community, and I will mention some of those today, some areas where there is consensus. It is very important at this time, when we had two proposals on the deck, and now three, that the business groups which have different opinions about proposals try to work together, and that is a principal function of our organization.

One thing I did want to mention very briefly, with the new insurance crisis, as it gets greater and greater, there has come forward something that I call the data hunt, and every week in the newspaper or elsewhere one side or another says there is a certain number of claims and then there is a rebuttal on the other side.

We were here seeking this type of legislation long before the data hunt began, and I think the reason that we went into this is because regardless of what the data show we do know that the future in liability law rarely reflects the past. For example, just in the past year, in February, the Supreme Court of Louisiana held that a totally innocent manufacturer would be subject to full and complete tort liability, breaking precedent of over 200 years. They said it was irrelevant what the manufacturer knew or could have discovered at the time it made the product.

In another court not far from here a court held that a gun manufacturer could be subject to liability even though there was no defect in the gun. Now the decision was based on the fact that the court's judgment was that the utility of the gun was nil and the dangers that it created were great. But they did not show that anything was wrong with the gun, and there was no precedent in the jurisdiction or any other jurisdiction that would sponsor that holding.

Again, in 1986, there was a case that arose in the Midwest where a person asked for damages because he was exposed to a chemical, but nothing was wrong with him. He did not have any symptoms, but he thought something might happen to him someday. He had a fear of future disease and the court held that he could receive damages.

So within the compass of 8 months, you have two—excuse me, three—startling new decisions, and one court says the innocent pay, another court says you can pay even though there is no defect, and the third court says you can pay even though someone has not been harmed.

It is that atmosphere that will keep this problem going until it is corrected, until some stability is put in the system. I think that the bills have to be evaluated in light of that need for stability.

We feel in that regard that while S. 1999 contains many things that are useful, it says nothing about whether liability should be based on fault. A fundamental principle of all reform efforts has been to put some perimeters on the system and the perimeter is wrongdoing, bad behavior, behavior that deserves sanction. So any bill that comes out of the committee should have some limit, and that limit should be fault-based liability.

Both bills limit joint and several liability. They do it in different ways, but of tort doctrines that really spawn with unfairness, joint and several liability has to be at the top, because one person is asked to pay for what somebody else did. Apart from situations where there is concert of action, joint and several liability should not apply.

The Reagan-Kasten bill imposes a $100,000 cap on all noneconomic damages. The Danforth bill ties the cap into a settlement-encouraging mechanism. We agree, however done, that some limit on the extent of noneconomic damages is appropriate in the law.

The Reagan-Kasten bill indicates that damages should be paid periodically. Properly structured, this can help both parties. Persons who pay will be able to use assets more wisely and better, and persons who receive those assets can use them in a way that will meet their daily needs. Many people, when they suddenly get $1 million, either spend it all at once or save it to a point where they do not use it at all. Periodic payments can help both sides.

Both bills deal with the collateral-source rule. It is clear that that rule fosters waste and double payment. We think it is important that elimination of worker compensation liens be included.

We also note in the administration's bill that the product-seller clause has not been included. That has been an area where we have agreed over the years that good work can be done.

Let me say a quick word or two about settlement-forcing mechanisms. We are on record for including those in a product liability bill, but we did not think at the time they first came forward that noneconomic damages are an appropriate area to consider. If they are to be considered, the wording should be crystal clear so people on both sides know how much payment is to be made; otherwise, litigation all over the place will be introduced into a mechanism that is supposed to foster settlement.

Finally, the amount of penalty placed on a manufacturer in S. 1999 is punitive in nature, where you have 25 percent of an award plus 1 percent of the award per month, you can generate hundreds of thousands of dollars of punishment in a case that may be appropriate to litigate.

Thank you for your continued patience with us. I hope we will see a resolution of this problem soon.

[The statement follows:]

STATEMENT OF VICTOR E. SCHWARTZ ON BEHALF OF THE PRODUCT LIABILITY ALLIANCE

Thank you for the opportunity to testify today on behalf of The Product Liability Alliance. The principal focus of this hearing is on the new versions of S. 1999 and S. 100. What is truly very new, as those who have followed this issue during its long history know, is that for the first time we have two major pieces of legislation each of which may attract broad-based support.

Before commenting on legislation, however, I believe it is important to go back to certain fundamentals—those fundamentals help demonstrate the kind of reform that is needed in this area.

NEED FOR UNIFORM PRODUCT LIABILITY LAW

What has created the current intense product liability crisis? There is no doubt that it has been prompted by the sudden increase in insurance costs. While costs have risen, deductibles have increased also. New limits have been placed on insurance policies.

All of this has spawned what I call the "data hunt"—the insurance industry and the trial lawyers battle back and forth as to whether, in fact, there has been a major rise in the number and size of claims. I think over time you will find that there are a variety of sources of data and that ultimately it is not possible to get a full handle on how many product liability claims there are nationwide. In point of fact, only the Federal courts and the state of Connecticut collect product liability cases per se and both have shown a substantial increase in the number of claims over the past ten years.

But we in The Product Liability Alliance have not come to the United States Congress simply because the number of claims has risen. That is not in essence the product liability problem. The problem, simply stated, is that the law in this area has become both unpredictable and unfair.

For example, in February 1986 the Supreme Court of Louisiana said that a manufacturer could be liable for a risk that "was not discoverable under existing technology . . ." The Court also said that the fact that at the time the product was manufactured the "benefits appeared greater than they actually were . . ." was irrelevant. It is crystal clear that the tort system was not designed for liability of this type. This type of liability is virtually absolute. And, as the Court rendered that decision it made no adjustment in the rules of damages. Those who have studied this subject know that both the collateral source rule, which results in people being paid who already have been paid, and the very substantial awards for non-economic damages, so called pain and suffering, were rooted in a system that embraced the fault principle.

The Court stated that "manufacturers, as a class, however, are still in a better position than consumers . . . to negotiate for broader insurance coverage, and to pass losses on in the form of price increases . . ." The premises of this statement may not be true. First, many tort claimants have already received a substantial share of out-of-pocket costs through workers' compensation or health and accident insurance. Second, health and accident insurance is a much more efficient form of risk spreading than liability insurance. More premium ends up in the hands of the injured party under health and accident insurance. Finally, many businesses cannot afford to absorb absolute liability and cannot obtain affordable insurance in an attempt to absorb it.

LIABILITY WITHOUT DEFECT

For over 200 years in this country you had to prove that there was at least some defect in a product. In a recent Maryland case a court held that liability can be imposed not because there was any defect in the product (a hand gun) but because in the court's judgment the product had no legitimate purpose and the manufacturer "knew it could be used in criminal activity." While one might personally agree or disagree with the decision, it is clear that it creates a completely new exposure for manufacturers. The underlying principle could hold liquor manufacturers liable for alcoholism, sellers of sugar liable for tooth decay, and fast food hamburger restaurants liable for fostering heart disease.

Notice also, and this is crucial regarding those who either self-insure or commercially insure, that once a decision like this is rendered it is hard to know what will happen in the future. Will other courts follow it?

LIABILITY FOR FEAR OR FUTURE INJURY

Again, in 1986 a Federal court of appeals interpreting Mississippi law recently permitted recovery for a former shipyard worker's medical "probability" of developing cancer in the future. The worker did not have cancer, yet he was allowed to bring a claim. Not only can a claim be brought for mental distress relating to the fear of getting cancer, but a claim could also be brought for the probability of getting cancer. Both bases of recovery are major departures from existing product liability law.

We plan to release today a white paper giving citations to these cases and demonstrating how they can affect the liability system. The paper develops in detail other situations showing that the current product liability system is a totally unpredictable mismash of differing rules. So long as this instability exists, those who attempt to insure will have a major problem.

Against that background, one can evaluate both the Reagan-Kasten Amendment to S. 100 and Senator Danforth's new bill. There is a need for predictability, and there is a need to reduce legal costs.

The Reagan-Kasten bill is a major and helpful addition to the product liability reform effort. It cuts through the thousands of words and reduces the issues to some

that are most important. There are some new issues that have not been addressed before—let me discuss each of them briefly.

The Reagan-Kasten bill provides for a fault basis of liability. We believe and will submit to this Committee modification of the specific language used to assure that manufacturers are only held liable when they engage in wrongful conduct. It is possible that simply using words such as "defect" or "unreasonably dangerous" without any definitions will provide too much latitude for court decisions that simply impose liability without fault. The concept, however, is very good and we agree with it. We are disappointed that S. 1999 does not contain a rule that would limit liability to fault. At the very least manufacturers should not be held liable when the ability to discover and to eliminate a defect or a danger was not available and capable of use according to engineering and manufacturing practices reasonably feasible in light of the technology that existed when the product was made.

The Reagan-Kasten bill limits the application of joint and several liability to situations where persons acted in concert. This parallels the general thinking of the amendment offered by Senator Pressler. We strongly support limiting joint and several liability to situations where the defendants aided and abeded in a conspiracy. S. 1999 moves in that direction, but not far enough.

The Reagan-Kasten bill imposes a $100,000 cap on all non-economic damages. While caps are very unpopular with some groups, the current system with totally open-ended liability on non-economic damages helps form the uncertainty that is inherent in the current crisis. Some reasonable limit on non-economic damages is appropriate. S. 1999 ties this limit to a settlement forcing mechanism. We believe there should be a general limit and a stricter limit with regard to cases where a manufacturer voluntarily makes an offer to settle.

The Reagan-Kasten bill indicates that damages for future economic loss over $100,000 should be paid periodically. We think this is a sound approach that will assist both manufacturers and persons who receive damages. It is easier to manage funds if they are paid as needed rather than in a huge amount. And, it is easier to pay large sums if they are paid periodically.

The Reagan-Kasten bill reduces the amount of awards by compensation already received from certain collateral sources. The Product Liability Alliance has been on record as suggesting that in addition to the sources listed in the Reagan-Kasten bill, the amount paid in workers' compensation be included. As we have indicated in prior testimony, eliminating the workers' compensation lien will help place incentives for safety where they belong—in the workplace—and will not reduce the amount of damages received by injured parties.

Some of our members have suggested that, in addition, all collateral sources, even those engendered by the claimant itself, should be subtracted from an award if the award is ever made on a basis other than pure fault.

The Reagan-Kasten bill establishes a schedule for the size of contingency fees. Many of our members believe in this, and if it is set on a fair basis, it will result in more of an award being paid to an injured party.

The Reagan-Kasten bill sets a limit on the amount of punitive damages. We think more is needed in the punitive damage area and find the approach set forth in the Danforth bill a welcome addition to that limit put forth in the Reagan-Kasten bill.

The Reagan-Kasten bill does not limit its application to product-related actions involving personal injury or property damage other than to the product itself. It has been TPLA's strong position that cases involving commercial loss should be left to commercial law. This concept was embodied in the Uniform Product Liability Act, H.R. 7921, S. 2631, S. 44, S. 100 and is contained in S. 1999.

We think there are other topics in S. 1999 that are essential to include in a product liability bill. We think that non-manufacturing product sellers should only be subjected to liability if they were at fault or if in a case involving a defective product the manufacturer is out of business or not reachable by judicial process. This provision will reduce transaction costs without limiting people's rights.

We agree that evidence of product improvements should not be admitted to prove that an older product was defective. We also agree that penalties should be imposed on both frivolous claims and defenses—penalties on the lawyers that bring those claims.

Finally, we think that limits should be placed on the admissability of expert testimony, as appeared in prior versions of S. 1999.

Let me state a word or two about settlement forcing mechanisms. In concept we agree with this approach, but the penalties set forth in S. 1999 are virtually tantamount to forcing manufacturers to settle in almost every case. They are so severe that it diminishes the power to make an objective judgment about whether a claim is worthwhile or not. This will result in more, not less, litigation. Also, the inclusion

of so called "dignitory" losses opens up an ambiguous and litigious area for alternatives means of compensation. All one has to do is speculate as to what the difference is between disfigurement and gross disfigurement to appreciate this fact.

In sum, we believe that the Reagan-Kasten bill is a new and helpful addition to the product liability debate and are supportive of the provisions that are in the bill with some of the modifications that I suggested today. In addition, there are aspects of the Danforth bill that may help create a sound and balanced product liability law. We look forward to working with all of the Senators on this Committee for that goal.

Senator KASTEN. Mr. Schwartz, thank you, and thank you for your comments.

Our next witness is Prof. David Owen, School of Law, the University of South Carolina. Mr. Owen.

Mr. OWEN. Thank you, Mr. Chairman.

I would like to comment briefly on certain aspects of the two bills.

First, I think Senator Danforth's most recent bill represents a strong approach that deserves serious consideration, but I am also pleased to learn that Senator Gorton is considering alternatives in the way of judicial oversight of the settlement process since there has been very little input into the alternative dispute resolution and settlement incentives proposals.

So, while the committee is anxious to report some bill out, I would hope that it not be hasty in adopting an approach that has not received a full critique from outside sources as well as serious consideration internally. Thus, I would urge restraint and would suggest that June 3 would appear to be an unrealistic date for a responsible bill out of this committee if it is seriously going to consider the settlement incentives approaches that have been only recently proposed.

Let me now make some comments on both the Danforth and administration bills. I only wish that my academia colleague, Prof. Jeff O'Connell, could be here to give us the views of James Joyce on these matters, as he is want to do. Perhaps because I am not Irish, or perhaps because my liberal education may have paled compared to his, the administration's bill reminds me more of Lewis G. Carroll's "Alice in Wonderland."

I am troubled that it has been put forth and is being considered, to some extent at least, as a serious proposal for legislation. While obviously it has received considerable intellectual thought, it is at a very basic, rough stage of quality and conceptualization compared to the several bills that this committee has considered over several years. And political ideology apart—and it is hard to put it apart when some of its measures are so Draconian—it seems that this bill is simply not worthy of much consideration other than as presenting a certain political point of view.

With respect to the Danforth bill, I am concerned that the uniform standards for manufacturers have been dropped out along the way.

If the Federal Government decides to legislate on the matter of products liability, as I believe it should now, then it would seem to me the height of irresponsibility for the legislative branch to refuse to legislate on the single most perplexing issue in products liability, which is the definition of the standard of liability.

So I suggest that at a minimum the negligence standards be reintroduced into the bill, for purposes of warnings and design litigation, and that strict liability be defined in some straightforward way—and I think that that is possible, notwithstanding the difficulty in the past—for purposes of express warranty and manufacturing flaws. Perhaps the idea of Senators Gorton and Dodd on providing strict liability for economic losses can be put into title III as an option for the plaintiff, for those cases where indeed the risk was unforeseeable or the method of dealing with it unpreventable under prevailing standards of technology.

So those are my general comments. My particular expertise is on punitive damages, and I would leave any discussion of that issue to the questions you might have.

Senator KASTEN. Thank you very much, Mr. Owen.

Let me ask you both, if I can, a question that kind of goes beyond your testimony here right this moment. Both of you have appeared before this committee a number of times. Both of you are acknowledged experts. You know where we have been from, let us say, 1981, when we began with Senate bill 44, and some of you began even before that.

But if you just look at the dramatic changes that have taken place since 1981 and 1982, and look at the kinds of changes that have taken place in the marketplace over the past 3 or 4 years, what is your opinion as experts who are watching this more carefully than anyone on this side of the table? What is your opinion of the predictability of future legal trends in product liability law?

You began your testimony here, Victor, by saying here are three different cases occurring. We just hear of someone suing the CAT scan maker for losing her psychic powers, whatever. Is there any way? What is your opinion of the predictability of future legal trends and is it not essential to predict these trends to adequately insure risks?

And am I right in saying it is just darn tough right now to get any kind of a handle on predicting these trends, even though we might disagree with the solution? I will start with you, Victor Schwartz.

Mr. SCHWARTZ. Well, we have just together, my senior coauthor, Dean Wade, and I have been working on the eighth edition of our casebook and there is a chapter on product liability. In any section in that chapter, one can find a case that will be different than what the law was just 5 years ago.

There really is no rule of product liability law in the United States today that one can say will be the same 2 or 3 years from now. In order to prove this carefully, we spent some time in the Product Liability Alliance to develop a white paper which is available for anyone who is interested in the subject today, to show just that fact.

I do not care if you are self-insured, commercially insured, have a mixture of commercial insurance, and self-insurance, and you try to set a rate or a premium, you cannot set it accurately because the rules are changing at an ever-increasing pace, and when these rules are changing, unlike legislation which is prospective in nature, the court rules are all retroactive, and that is one of the reasons why in this current insurance crisis, it is unlikely that in-

surers are going to jump back in this particular area because it is virtually unpredictable at this time.

Senator KASTEN. Prof. David Owen, what is your opinion of the predictability of future legal trends in this area?

Mr. OWEN. Senator, I concur with what Professor Schwartz remarks on this point. I have been really holding back on the preparation of the second edition of my products liability casebook in part because of the fact that there are no trends.

The only discernible trend is chaos, and that is why it seems to me imperative that a full product liability code—including the type of S. 100 sophisticated standards that you and your staff developed over so many years of careful thought—be reintroduced in title III, even in a simplified form if necessary, but including at least the basic standards of liability and defense to provide some formal structure for the courts to begin to interpret.

I am really quite frustrated to see so many years of good work that was tending toward a sound and balanced approach in S. 100 being discarded altogether and left to the States, when indeed there has been nothing but chaos in the States. Even States like New Jersey and Texas, that had been pointing toward comprehensible standards of liability and defense in the 1970's, have in recent years added to the confusion with each new cluster of law clerks or judges who feel compelled to reinvent the wheel time and time again, so that there are few constructive trends even in individual State jurisdictions.

So in the interests of achieving some type of comprehensible products liability law—and if "law" means anything at its basis it must be something that is comprehensible to the persons regulated by it—it seems to me vital that basic standards of liability be outlined in title III of the Danforth bill, perhaps with the addition of some Gorton concepts in the process.

I do not think that the committee process needs to go on for another 5 years. With the interest that I have seen today in the committee, a consensus appears within grasp within several months, or perhaps the next Congress.

But it seems to me irresponsible, just to be done with a difficult job, to take a mere 2 weeks to try to resolve the very basic differences in approach still remaining, to work out the kinks in the new concept of settlement incentives, and to try to build a really good bill to be reported out in that period.

Senator KASTEN. Very briefly, Professor Owen, what is your view to the approach of punitive damages taken in the administration proposal and your approach or your opinion of the approach on punitive damages in the amendment to S. 1999.

Mr. OWEN. Briefly, I think the administration's lumping together punitive damages and pain and suffering and other intangible losses is mixing together apples and oranges and simultaneously, I think, imposes a cap that is considerably too low for the functions of either type of damages.

Second, I think the administration bill fails to implement one of the objectives of the legislation stated in its preamble or findings, and that is to help eliminate some of the vagueness and uncertainty in the law.

I think the Danforth bill on the other hand, which generally approaches the problem from the perspective of S. 100—which I think had evolved into a sophisticated approach to the problem that drew from Professor Schwartz' work—constructs a system of principles that are understandable, somewhat more predictable than current law, and fair.

In addition, I think the Danforth bill has added a couple of very healthy additions—such as the cap of double compensatory damages, and one or two other improvements—that strengthen the approach.

Senator KASTEN. Let me say that today's hearing was to be focused on the new Danforth amendment and on the substitute to S. 100. It is not my opinion, and I do not think it is the opinion of most of us on the committee, that the work that we have done on S. 44 and then S. 100 will be forgotten or be set aside.

Our hope is that we will take the elements of each of these different proposals and be able to put them together. I do not think we are going to be able to pass a bill out of this committee on June 3 if, in fact, we begin the markup on that day.

But, I think what may be about to occur in the Commerce Committee is something not unlike what occurred in the Finance Committee, whereby we had a number of different proposals and we basically brought people together here, argued for and against amendments, and hashed them out. And we need the process of working, the legislative process in the committee. That is what I believe will be happening, and I think that the positive parts of a number of these proposals, including the administration proposal, will come forward.

I would like to thank both Mr. Schwartz and Professor Owen.

Our next panel will include Mr. Carrico, Mr. Few, Mrs. Chalfie, Mr. Reynolds, and Mr. Cortese.

[Pause.]

Senator KASTEN. The first witness will be Hon. Harry L. Currico, chief justice of the Supreme Court of Virginia, representing the Conference of Chief Justices.

It is an honor to have you before us, sir. We look forward to your testimony.

STATEMENTS OF HON. HARRY L. CARRICO, CHIEF JUSTICE, SUPREME COURT OF VIRGINIA; J. KENDALL FEW, COUNSEL, GREENVILLE, SC; DEBORAH CHALFIE, LEGISLATIVE DIRECTOR [HALT], AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM; HUGH E. REYNOLDS, JR., PRESIDENT, FEDERATION OF INSURANCE AND CORPORATE COUNSEL; AND ALFRED W. CORTESE, JR., REPRESENTING THE NATIONAL COALITION FOR LITIGATION COST CONTAINMENT

Judge CARRICO. Thank you, sir. It is an honor to be here.

Mr. Chairman and Senator Hollings, I am Harry L. Carrico, chief justice of the Supreme Court of Virginia, and I appear today on behalf of the Conference of Chief Justices, composed of the highest judicial officials of the 55 States and territories and the District of Columbia.

The bills now under consideration show commendable progress by their drafters in understanding the profound impact a Federal product liability law, perhaps without creation of Federal question jurisdiction, would have on the courts of the States. And I say perhaps without creation of Federal question jurisdiction, Mr. Chairman, because our reading of the legislation, until this morning, led us to believe that Federal question jurisdiction had not been conferred.

We were informed this morning that that was the intent of the legislation. If that is true, I suggest that perhaps the Judicial Conference of the United States ought to be made aware of this interpretation. The conference has not yet taken a stand on this legislation and the new understanding might affect its position.

These bills are less comprehensive, and therefore somewhat less complex and somewhat less intrusive. Senator Danforth's amendment also shows a commendable concern for promoting settlements to reduce litigation and its many attendant costs. But despite these helpful trends, the legislation, in our opinion, remains fatally flawed. It simply is not possible for Congress to preempt one area of the tort law of the States without creating new complexities for the Federal system and unsettling the whole body of State tort law.

There is, in short, no quick fix for what some perceive as the shortcomings of the present system, particularly if uniformity is a principal goal.

What will the proposed Federal legislation do in this regard? First, we must view these Federal standards as a single overlay on the 55 existing State and territorial court systems, as well as the Federal system under diversity jurisdiction. The overlay will fit somewhat differently in each instance. It will impact some States more heavily than others. But in each instance we will have in conjunction with existing State law and practice that remains unchanged, a unique new product liability system. And this new system will coexist with an unchanged system for other claims in tort.

It follows that the Federal standards, however well crafted, will be applied in many different contexts, and that they will inevitably be construed and applied differently, not only by the State courts, but by the 13 Federal circuit courts of appeals.

With each State starting anew, such uniformity as we have achieved to date will be destroyed and the long process of interpretation to unravel new concepts will begin. In this process, the State supreme courts will not be as they are today: the final arbiters of the tort law of their States.

Federal statutory standards, with or without Federal question jurisdiction, will make the U.S. Supreme Court the court of last resort for a new class of cases with mixed State and Federal questions largely outside its current jurisdiction.

We will not only have State courts interpreting and applying a mix of State and Federal law in the same case, but we will have the lower Federal courts under diversity jurisdiction interpreting and applying the same mix. A legal thicket is inevitable, and the burden of untangling it, if it can be untangled at all, will lie only with the Supreme Court of the United States.

The consequences for federalism, as well as uniformity, are therefore incalculable. This is because no other Federal law has reached so far into the substantive civil law which traditionally has resided in the States and which, under diversity of citizenship jurisdiction, also has been binding on the Federal courts.

The States will be forced to provide the judicial structure, but will not be permitted to decide the social and economic questions in the law which its courts administer. It also is clear that the pending bills, while limited to products in interstate commerce, have the potential for destroying the common law in the whole range of tort reparations. Certainly each State, in starting over in the product field, must weigh the impact of these standards on other areas of the law.

My final comment concerns an issue that, while not central to the current debate on product liability, has provided considerable background noise. We have all heard that there is a litigation explosion. There is a widely held belief that our society is becoming ever more litigious; that we are far too willing to sue for damages and punitive awards.

We have not experienced this explosion in Virginia, and I had assumed until recently that we were, for some unknown reason, an exception to the general rule. A new study by the National Center for State Courts has informed us, however, that we are not all that different.

It is important to note that this study contains data from only 20 States and was not directed at the substantive issues of product liability law. It asked and sought to answer only one question: Has there been a litigation explosion in the courts of the States?

To answer this question the researchers concentrated on four categories of civil cases that would best reflect a punitive mindset conducive to litigation: tort, contract, real property rights, and small claims.

A careful analysis of the data, the researchers concluded, "provides no evidence to support the existence of a national litigation explosion in State trial courts during the 1981–84 time period," the most recent for which data are available.

I see my time is up, sir. I have a copy of that report which I would be glad to leave with the committee if it wishes, and I thank you for the opportunity of addressing you, sir.

Senator KASTEN. Without objection, a copy of the report will be included in the record by reference.[1]

[The statement follows:]

STATEMENT OF THE CONFERENCE OF CHIEF JUSTICES

Mr. Chairman and Members of the Subcommittee. I am Harry L. Carrico, Chief Justice of the Supreme Court of Virginia and appear today on behalf of the Conference of Chief Justices at the request of the Conference's President, Chief Justice Edward F. Hennessey of the Supreme Judicial Court of Massachusetts. The Conference is composed of the highest judicial officials of the 55 states and territories and the District of Columbia.

We appreciate the opportunity to express our views on the pending Danforth amendment to S. 1999 and the Kasten amendment to S. 100. These views are guided

[1] See Preliminary Examination of Available Civil and Criminal Trend Data in State Trial Courts, 1978, 1981, and 1984, National Center for State Courts.

by the Conference's formal policy position which opposes federal preemption of the tort law of the states. Under that policy we opposed previous proposals that would have replaced state statutory and common law governing the substantive rules of product liability and damages. In doing so we have not spoken from the perspective of the plaintiff or the defendant, but from that of the judicial officials who would have primary responsibility for administering the federal law.

The bills now under consideration show commendable progress by their drafters in understanding the profound impact a federal product liability law, without creation of federal question jurisdiction, would have on the courts of the states. These bills are less comprehensive and therefore somewhat less complex and somwhat less intrusive. Senator Danforth's amendment also shows a commendable concern for promoting settlements to reduce litigation and its many attendant costs.

But despite these helpful trends the legislation remains fatally flawed. It simply is not possible for Congress to preempt one area of the tort law of the states without creating new complexities for the federal system and unsettling the whole body of state tort law. There is, in short, no quick fix for what some perceive as the shortcomings of the present system.

We should not forget that we did not suddenly arrive at the present state of the law, nor did we arrive here by chance. Current doctrines were not devised by law professors on theoretical grounds. They developed over many decades to meet real but changing needs and reflect an accumulated wisdom based on countless thousands of arguments before the courts and legislatures of the states, institutions with some claim to a role in the great American experiment in self-government.

Nevertheless, some say the law of product liability has gone too far; that the cost of production and the risks of business enterprise have increased inordinately; that liability insurance is either too expensive or unavailable; that industrial and commercial progress is unnecessarily inhibited.

Let us assume for the moment that tort and warranty rules have gone too far, an assumption I am willing to make only for the purposes of discussion, and that a reversal in the trend is needed. Is federal legislation the answer? First of all, if we are looking for uniform, settled law, the answer cannot be found in federal legislation. We already have a high degree of uniformity on major points of law. This has been achieved over many decades through tens of thousands of cross precedents in case law relied on by the states. The rules for product liability developed and recommended by the American Law Institute's restatement of torts and the Uniform Commercial Code of the National Conference of Commissioners on Uniform State Laws have been widely accepted.

What will the proposed federal legislation do to uniformity? All related state law will be preempted and a federal law, with new terms and new concepts, will be substituted. We must view these federal standards as a single overlay on the 55 existing state and territorial court systems as well as the federal system under diversity jurisdiction. The overlay will fit somewhat differently in each instance. It will impact some states more heavily than others. But in each instance we will have, in conjunction with existing state law and practice that remains unchanged, a unique new product liability system. And this new system will coexist with an unchanged system for all other claims in tort.

It follows that the federal standards, however well crafted, will be applied in many different contexts and that they will inevitably be construed and applied differently, not only by the state courts but by the 13 federal Circuit Courts of Appeals. With each state starting anew the uniformity achieved to date will be destroyed and the long process of interpretation to unravel new concepts will begin. In this process state supreme courts will not be, as they are today, the final arbiters of the tort law of their states. Federal statutory standards, even without federal question jurisdiction, will make the United States Supreme Court the court of last resort for a new class of cases with mixed state and federal questions largely outside its current jurisdiction. We will not only have state courts interpreting and applying a mix of state and federal law in the same case but we will have the lower federal courts, under diversity jurisdiction, interpeting and applying the same mix. A legal thicket is inevitable and the burden of untangling it, if it can be untangled at all, will lie only with the Supreme Court of the United States.

The consequences of federalism, as well as uniformity, are therefore incalcuable. This is because no other federal law has reached so far into the substantive civil law which traditionally has resided in the states and which, under diversity of citizenship jurisdiction, also has been binding on the federal courts. The states will be forced to provide the judicial structure but will not be permitted to decide the social and economic questions in the law which its courts administer. It also is clear that the pending bills, while limited to products in interstate commerce, have the poten-

tial for destroying the common law in the whole range of tort reparations. Certainly each state, in starting over in the product field, must weigh the impact of these standards on other areas of the law.

As Chief Justice Jack Pope of Texas noted in earlier testimony, "States cannot, consistent with sound administration of justice, judicial economy and justice, have one set of rules to try product liability cases and a different system to try an ordinary negligence or malpractice case. Even the joinder of a physician in a products liability case concerning this administration of defective drugs, will require two different systems of trial and submission to the jury, or a complete overhaul of our state tort systems."

On the questions of federalism it also is important to note, along with Chief Justice W. Ward Reynoldson of Iowa, another of my predecessors as a witness before this subcommittee, that "it makes no sense to federalize a significant portion of state tort law while denying jurisdiction to the federal courts under diversity of citizenship when diversity jurisdiction, in the view of most expert opinions, should be eliminated as a first step in reform of our dual system of state and federal courts." Federal intrusion in state tort law, as Chief Justice Reynoldson said, will throw "a great unknown" into what is, after some 200 years of development, "a carefully balanced national system of justice."

Allegations of excessive legal costs, excessive cost of products, and the excessive cost or unavailability of liabiity insurance are at the root of present federal proposals. If those allegations are true, the remedies lie with the states, where tort and warranty law have always resided. State legislatures are well situated to determine the social and economic impact of present law on their own communities, and many already are immersed in product liability issues. Given the trend of present legislative inquiry in several states it is possible that they will not greatly dilute the uniformity of present liability rules but will consider limitations on legal costs and damages.

In closing I would like to comment on an issue that, while not central to the current debate on product liability, has provided considerable background noise. We have all heard that there is a "litigation explosion". There is a widely held belief that our society is becoming ever more litigious, that we are far too willing to sue for damages and punitive awards.

We have not experienced this explosion in Virginia and I had assumed until recently that we were, for some unknown reasons, an exception to the general rule. A new study by the National Center for State Courts has informed us, however, that we are not all that different.

It is important to note that this study data from only 20 states and was not directed at the substantive issues of product liability law. It does not, for instance, contain separate data on the number of product liability suits, nor does it deal with such issues as the size of damage awards or the cost or availability of liability insurance. Nor, of course, does it contain data on product liability case filings in the federal courts. The study asked, and sought to answer, only one question: Has there been a litigation explosion in the courts of the states?

To answer this question the researchers concentrated on four categories of civil cases that would best reflect a punitive mind set conducive to litigation: tort, contract, real property rights, and small claims. A careful analysis of the data, the researchers concluded, "provides no evidence to support the existence of a national 'litigation explosion' in state trial courts during the 1981-84 time period", the most recent for which data are available.

In the area of torts alone, which includes product liability cases, the study found that filings increased by 9 percent between 1978 and 1984 but that this increase was almost entirely offset by an 8 percent increase in population.

The overall data led the researchers to these conclusions:

"An upward trend in litigation in anyone period is not necessarily attributable to an increase in the tendency of the average American to sue, but may indicate a simple increase in the number of average Americans.

"There may have been significant increases in civil filings which peaked around 1981; however, civil filings (defined as tort, contract and real property rights cases) decreased slightly during the 1981-84 period. In fact, in state courts that reported data for the 1981-84 time period, there were decreases in the total number of filings."

Interested parties have and will continue to debate the meaning of these findings. But the study is the most authoritative available and the burden of proof has shifted to those who now would claim the existence of the explosion, in the state courts at least. Virginia statistics were not included in the study but, as I have indicated, they are consistent with the general findings. This is not to imply, of course, that

many state courts, especially in states with large metropolitan areas, are not severely burdened by current case loads; that there are not serious problems of backlog and delay. But it does tell us there is some emotion mixed with the facts of those who speak of a litigation "crisis" or "explosion", and that state court systems, all things considered, might well be doing a creditable job.

The term "creditable" is used advisedly, knowing that much remains to be done. But it also means we are capable of addressing the issues raised by the product liability debate, and to do so in a manner consistent with the orderly development of the law within our federal system.

Again, my thanks for this opportunity to express our views.

Senator KASTEN. We thank you for your testimony.

Our next witness on this panel is Mr. J. Kendall Few of the law firm of Few & Glenn, Greenville, SC.

Mr. Few.

Mr. FEW. Thank you, Mr. Chairman, Senator Hollings, members of the Senate Commerce Committee.

I am a trial lawyer from Greenville, SC. I had thought until today that I was a typical trial lawyer, but I do not customarily make $2½ billion every 8 weeks, so I suppose I am not.

I have one burden with me today that I carry that I think perhaps none of the other witnesses have carried to the witness stand today, and that is that I have actually engaged in the trial of products liability lawsuits for the past 20 years. During that time I served 8 years as a civil defense lawyer, 1 year as a judge, and for the last 11 years as a plaintiffs' lawyer.

What I have to say today to this committee is contained in the testimony which has been passed forward and I would like for that to be incorporated into the record of this hearing.

My testimony is summarized on pages 2 through 4 of this document which we have handed up. We have footnoted each part that we have made and we have attached to that studies that we felt were valid that were done by disinterested groups.

The first is a point that Judge Carrico covered in his testimony and that is, No. 1, that there is no litigation explosion in the United States, and I cite the same report that he cites, which states that from a period of 1978 through 1984, that the population in the United States increased by 8 percent and that tort filings increased by 9 percent.

Second, I say that there is no products liability crisis in the United States. And there we cite for that, other than in the lives of the individual victims in each case. We are prepared to show through work that we have done in the past week, which is the time since we were notified that we would be asked to come here, a period of 3 days. My son, John Few, who is seated to my right and who is a freshman at the University of South Carolina, went to the court of common pleas for Greenville County, SC, cataloged every jury verdict for a period of 5 years, from May 1981 through May 1986.

Mr. Chairman, if you will look in my handout beginning on page 41, you will see that we have listed by name and case number every case that went to jury trial in Greenville County, SC, during that time. If you will look back, sir, two pages earlier on page 33, you will see that the South Carolina Verdict Survey Guide, published by a Jury Verdict Research of Solon, OH, which I believe is the source of your comments to the committee on April 30 of this

year that the average product liability verdict was $400,000 but has now increased to $1.8 million, that they say that the verdicts in Greenville County, SC, are 3 percent above the national average.

Now, we have cataloged each one of those for a period of 5 years. We have found that the average verdict, counting defense verdicts in Greenville County, SC, is $10,000. Sixty-three percent of those verdicts were won by the plaintiff and the remainder by the defendant. Of the successful verdicts, $16,000 is the average.

We have also set forth on pages 40 and 41 the details on 11 cases where a verdict was rendered in excess of $100,000. In none of those cases, Mr. Chairman and Senator Hollings, were there involved issues of product liability.

Now, it is our proposal—and I have given $25,000 personally to the University of South Carolina and agreed to contribute $25,000 more so that they can perform this same type of comprehensive jury verdict survey throughout the State of South Carolina.

What I am saying to you, Your Honor, is that your information is flawed, and I put it in my testimony, if I may read that, on page 3 in paragraph 6:

> Jury verdict statistics which have been quoted by those who are sponsoring this legislation are not merely inaccurate, Mr. Chairman, but are so grossly exaggerated as to indicate a conscious intention to deceive the American public and the Congress of the United States.

All that I am asking in behalf of the victims of corporate indifference is that before you amputate the leg that guarantees the right of trial by jury, that guarantees the right of just compensation, that guarantees the right of equal justice under law, that you check the pulse in that leg.

Now, I see that my yellow light is on. I made notes of various questions that were asked by other members of this committee who are now not present. I am prepared to answer any of those questions that this committee may like to have answered from the viewpoint of a person who has sat there with the plaintiff in a products liability case and held the hand of a widow as the jury came back through the jury room door, in a case where her 40-year-old husband had been killed in an explosion by a salt bath that burned him over 80 percent of his body and had laid there in the hospital, in Humana Burn Center in Augusta, GA, for a period of 21 days, who was scrubbed—as the previous witness said—every day, and whose wife and children lost their husband, lost their father; and as to whom you would say that the people of the United States who elected you as Senator and who had the wisdom and the judgment to elect each of you are not fit and are not qualified to consider all of the facts of the case, including the nature of the product, the extent to which it was unreasonably dangerous under section 402(a) of the Restatement of Torts which has been adopted by 46 out of 50 States of the United States, the extent to which the injury was foreseeable, the degree to which the defendant knew.

And if you would care to read, I know many of you all are nonlawyers, and for that reason, Mr. Chairman, I have put down 24 typical cases and I have cited in there and I have put in the patents that these people had of safety devices that would have

kept these poor people from being injured and killed so that you could familiarize yourself with it.

I would like to close on this one point. In the *Pinto* case—that is *Grimshaw* v. *Ford Motor Company* in California—there was a memo that did not surface until well into the litigation. Many cases had been tried. But that memo did this: An engineer of Ford said that it would cost us $4 per car to make these cars safe. And yet we conclude that we can save $100 million by allowing them to continue in an unsafe condition.

I have cited what the courts in California said about this risk/benefit analysis and the callous indifference of Ford Motor Co. to public safety. But what I would tell you here today is——

Senator KASTEN. Let me ask you to conclude your statement.

Mr. FEW. Yes, sir. This is it. That was a comma right there.

What I would tell you here today is that what you are giving the manufacturers of the United States is a way that they can calculate whether it is safer for their balance sheet to continue to kill innocent victims or to fix and render the unreasonably dangerous product not unreasonably dangerous.

Thank you very much Senator Hollings and Mr. Chairman.

[The statement follows:]

STATEMENT OF J. KENDALL FEW*

Mr. Chairman, Senator Hollings, Members of the Senate Commerce Committee. I appreciate the opportunity to appear before this Committee to testify concerning the proposed Products Liability Reform Act. I am a trial lawyer [1] from a two-man law firm in Greenville, South Carolina, specializing in products liability and professional malpractice litigation.[2] I am a 1966 graduate of the University of South Carolina School of Law.[3] In my twenty years of practice I have served as a Civil Defense lawyer for eight years, as a County Judge for one year,[4] and as a plaintiff's lawyer for eleven years. During the last eight years, I have had the honor to make a total of 46 Continuing Legal Education seminar presentations to trial lawyer organizations and bar association groups in 18 states and the District of Columbia on products liability, demonstrative evidence and professional malpractice and have several recent publications on these subjects.[5]

My testimony here is based on my experience as a trial lawyer, my own personal research, and what I believe to be reliable research by others. In summary, my conclusions are as follows:

1. There is no litigation explosion in the United States.[6]
2. There is no products liability crisis in the United States.[7]

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*The attachments were not reproducible.

[1] Our practice is 100 percent civil litigation, 100 percent for the plaintiff and 100 percent on a contingent fee basis.

[2] Our practice is approximately 25 percent products liability, 60 percent professional malpractice and 15 percent anti-trust and securities litigation.

[3] At the University of South Carolina School of Law, I served as Editor-in-Chief of the *South Carolina Law Review*, a member of the Wig and Robe Honor Society and the National Moot Court Team and was named 1966 Law School Graduate of the Year in the Fourth U.S. Judicial Circuit by the Phi Delta Phi legal fraternity.

[4] Judge of the Civil, Criminal and Family Court of Oconee County, South Carolina.

[5] E.g., *Safety and Human Factors Engineering for Agricultural Machinery* (1981); "Demonstrative Evidence in the Products Case," 19 Trial Magazine 100-105 (Nov., 1983); "Preparation and Presentation of the Obstetrical Malpractice Case," *ATLA Masters at Work*, 313-341 (1984); "The Chevette Crankshaft Pulley Bolt Fiasco" (Trial Magazine in publication); "Obstetrical Malpractice" (a textbook in progress).

[6] See, "A Preliminary Examination of Available Civil Criminal Trend Data in State Trial Courts for 1978, 1981 and 1984," produced by the Court Statistics and Information Management Project of the National Center for State Courts, 300 Newport Avenue, Williamsburg, Virginia 23187-8798 (April 1986). See pp. 23 through 29 below.

[7] Other than in the lives of the individual victims.

3. Juries in the state and federal courts of the United States are composed of fair-minded, reasonable citizens who make a conscientious effort to reach a fair and equitable decision on the merits of each case based upon well considered rules of evidence and liability. These rules represent the collective wisdom of our American legal system over the past 200 years.

4. Verdicts of juries serving on products liability cases are fair, reasonable and commensurate with the degree of fault of the defendant and the extent of injury of the plaintiff.

5. There are presently no reliable statistics available on jury verdicts on products cases in the United States.

6. Jury verdict statistics which have been quoted by those who are sponsoring this legislation are not merely inaccurate, but are so grossly exaggerated as to indicate a conscious intention to deceive the American public and the Congress of the United States.

7. Accurate jury verdict statistics in products cases can be produced within a reasonable time and at a reasonable cost.[8]

8. The typical products case involves an unreasonably dangerous product which could have been made reasonably safe by the manufacturer at a nominal cost with available technology.

9. The various versions of the Products Liability Reform Act now before this Committee are ill-advised and inequitable proposals that will accomplish all of the following undesirable results: (a) Deprive innocent victims of fair compensation; (b) Destroy incentives to produce safe products; (c) Deprive poor and middle income Americans of access to effective legal representation; (d) Mire our entire legal system in a swamp of endless litigation; (e) Dramatically increase litigation costs; (f) Seriously erode the concept of equal justice under law.

10. The current concepts of the Common Law have served us well and should be retained. The mind of man has yet to devise a superior system to trial-by-jury. There is no keener wisdom than the common sense of the common man.

INCIDENCE OF CIVIL LITIGATION IN THE UNITED STATES

According to an April 1986, study published by the National Center for State Courts, there is no "litigation explosion" in state trial courts in the United States:

"Careful examination of current available trial court data relating to tort, contract, real property rights and small claims cases, from a representative group of state courts, provides no evidence to support the existence of a national 'litigation explosion' in state trial courts during the 1981-1984 time period."[9]

According to this study, the increase in tort litigation roughly approximates the increase in total population:

"In the area of torts alone, . . . total filings increased slightly in both the 1978-81 and the 1981-84 periods. . . . For the entire period 1978-84, total tort filings increased nine percent, but the population also increased by eight percent."[10]

This study concludes with the observation that "the often cited litigation explosion thus appears to be exaggerated. . . ."[11]

Another authority has concluded that the number of lawsuits filed per capita has remained constant since 1959.[12]

EXISTENCE OF A "PRODUCTS LIABILITY CRISIS"

Two methods of determining whether a "products liability crisis" actually exists are:

1. Analysis of accurate and complete jury verdict statistics over an extended period.

2. Analysis of insurance industry profits over an extended period.

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[8] See, discussion of jury verdicts in Greenville County, South Carolina, on pp. 7 through 10 below and discussion of the South Carolina Jury Verdict Research Project on pp. 10 through 12 below.

[9] See, footnote 6 above, p. 1, and p. 24 below

[10] See, footnote 6 above, page "ADD ONE", and p. 25 below.

[11] See, Footnote 6 above, page "ADD TWO", and p. 26 below. "Whatever the explanation, there is no evidence to support the notion of a nationwide increase in lawsuits in the state trial courts between 1981-84." See, Footnote 6 above, Part II, second page, and p. 29 below.

[12] Statement of Gustave Shubert, Director, Rand Institute for Civil Justice, before the National Conference of State Legislatures, Denver, Colorado, January 4, 1986. Source: National Insurance Consumer Organization Memo, page 2, entitled, "Insurance Industry Tall Tales." National Insurance Consumer Organization, 121 N. Payne Street, Alexandria, Virginia 22314. See p. 31 below.

Accurate jury verdict statistics

According to the National Insurance Consumer Organization, the jury verdict statistics relied upon by the insurance industry are inaccurate:

"The figures disseminated by the insurance industry are the average of awards to plaintiffs reported by Jury Verdict Research, Inc., of Solon, Ohio, which collects cases it learns about through a clipping service it subscribes to, through legal publications such as the ATLA Law Reporter, through reports directly from plaintiff's lawyers, and through reports by a small fraction of court clerks. Since the popular press, understandably, report only the big cases, and since plaintiff's lawyers report only their great victories, the average of awards to plantiffs collected by JVR is far higher than the average of awards to all plaintiffs. Moreover, JVR's data do not include defense verdicts, which consistently account for more than half . . . of all jury verdicts. Finally, JVR includes in its data base both verdicts that were remitted by the judge . . . and verdicts that were later reversed on appeal." [13]

This is not to say that the Jury Verdict Research statistics are completely without value, but it is generally acknowledged in the legal profession that their main value is for the purpose of comparison, such as comparison of jury verdicts for the same type of injury in different areas of the country. In this connection Jury Verdict Research's "South Carolina Area Verdict Guide" [14] has concluded that jury verdicts in Greenville County, South Carolina, are three percent above the national average. Therefore, if this observation is accurate, a comprehensive survey of jury verdicts in Greenville County, South Carolina, should give some insight into the probable average of jury verdicts in the United States.

Upon being requested to testify before this Committee, representatives of our office [15] were able to catalog every jury verdict in every jury trial in the Court of Common Pleas [16] for Greenville County, South Carolina, for the past five years.[17] The basic data from this short survey are set forth on pages 41 through 64 below. While we were unable, due to time limitations, to determine how many of these verdicts came in products liability cases, we were able to determine that none of the verdicts for $100,000 or more came in a products liability case.[18]

According to the 1986 South Carolina Legislative Manual, Greenville County is the largest county in South Carolina by population [19] with a 1980 population of 287,913. Slightly more than nine percent of South Carolina's three million residents live in Greenville County. It is located in the Piedmont section of the state and lies approximately midway between Atlanta, Georgia, and Greensboro, North Carolina, on Interstate Highway 85.

Proceedings in all jury trials in the Court of Common Pleas for Greenville County are recorded in the Common Pleas Journal, a record maintained by the Clerk of Court in accordance with South Carolina law.[20] During this five-year period, there were 644 jury verdicts in the Greenville County Court of Common Pleas. Sixty-three percent (407) were in favor of the plaintiff and thirty-seven percent (239) [21] were for the defendant. The Common Pleas Journal is a public record and we have cited the page number for each verdict in case there is any question in regard to the accuracy of our data.[22] Other than the eleven cases which resulted in a jury verdict of $100,000 or more,[23] time did not permit us to determine whether any of the remaining verdicts were reversed on appeal.

From this basic data, we were able to determine the following:

1. In 407 cases in which the plaintiff was successful, damages were awarded in a total amount of $6,558,276. This is an average of $16,114 for each of the 407 plain-

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[13] National Insurance Consumer Organization Memo entitled, "Insurance Industry Tall Tales" which is reproduced on pp. 30 through 32 below.

[14] See attachment at pp. 33 through 35 below.

[15] Consisting of myself and my son, John Cannon Few, who is a junior law student at the University of South Carolina School of Law.

[16] This includes all state court verdicts, but no federal court verdicts.

[17] This process took approximately 20 man-hours over a period of three days.

[18] Eleven verdicts for $100,000 or more are identified on pp. 39 through 40 below. None came in a products case.

[19] See p. 36 below.

[20] Although the maintenance of a Common Pleas Journal is required by *South Carolina Code*, § 14-17-540, only 30 of South Carolina's 46 counties maintain such a record by that name. The remainder, however, record essentially the same information in other journals, such as the Judgment Book, Court Minutes or Docket Sheets. See p. 37 below.

[21] There were two cases involving counterclaims in which verdicts were rendered for both plaintiff and defendant.

[22] See pp. 41 through 64 below.

[23] See pp. 39 through 40 below.

tiffs' verdicts and $10,184 for each of the 644 cases in which a verdict was rendered.[24]

2. In 407 cases in which the plaintiff was successful, total actual damages were $5,588,781. This is an average of $13,732 per plaintiff verdict and an average of $8,678 for all verdicts.

3. In a total of 396 cases in which plaintiffs' verdicts were awarded for less than $100,000, total damages were $3,377,467 for an average of $8,529 per plaintiff's verdict, and an average of $5,244 for all verdicts.

4. Punitive damages were awarded in eighty cases. This is approximately one out of five (19.6%) of plaintiff's verdicts and one out of eight (12.4%) of all verdicts.[25] Total punitive damages awarded in these eighty verdicts was $969,495, or an average of $12,119 for each case in which punitive damages were awarded. The only punitive damages verdict in excess of $100,000 was reversed on appeal.

5. In thirteen cases, the defendant was awarded a verdict on counterclaim. Total damages were $100,030, for an average of $7,695 per case.

6. As a percentage of all cases, only 1.7 percent (11 cases) resulted in a verdict of $100,000 or more, 2.5 percent (16 cases) resulted in a verdict of $75,000 or more, 3.3 percent (21 cases) resulted in a verdict of $50,000 or more, 9.2 percent (59 cases) resulted in a verdict of $20,000 or more, and 16.4 percent (106 cases) resulted in a verdict of $10,000 or more. In other words, 83.6% (5 out of every 6 cases) resulted in a verdict either for the defendant or for the plaintiff in a total amount of less than $10,000.

7. No verdict of $100,000 or more was rendered in any products case.

The South Carolina jury verdict research project

I have personally agreed to contribute $25,000 and to raise an additional $25,000 through the South Carolina Trial Lawyers Association to the South Carolina School of Law to fund a comprehensive jury verdict research project which will, in the manner discussed above, identify and catalog each jury verdict in both state and federal courts in South Carolina for the past ten years. This project will be administered by the South Carolina School of Law and will seek input and contributions from all interested organizations, including the South Carolina Bar Association, the South Carolina Bar Foundation, the Defense Research Institute, the South Carolina Medical Association, the insurance industry, and others.

With respect to each case identified as described above, a law student involved in this seminar program will catalog the type of cause of action, the type of injury, and other information as set forth in the South Carolina Jury Verdict Research Project proposed case information form.[26] We anticipate that the project will be completed in late 1986 or early 1987 and we believe that this will provide all interested groups, including the President and the Congress of the United States with the most comprehensive jury verdict statistics available in products cases. As a part of this project, we will encourage and assist interested organizations in other states to engage in a similar program.

To my knowledge there are no reliable and comprehensive jury verdict statistics in products cases now available. I believe that it is the duty of all elected officials, including the Congress of the United States, to make a reasonable effort to base all public policy decisions on reliable data. For this Committee to proceed with this legislation without this data would constitute a dereliction of its public duty.

Punitive damages in products cases

Stephen Daniels, Project Director of the American Bar Foundation, presented a comprehensive preliminary report on the Punitive Danages Project to the American Bar Foundation Fellows Seminar on February 8, 1986. In this presentation, he stated as follows:

"For all the storm warnings being issued by these various weather observers, surprisingly little empirical information is available on the actual use and awarding of punitive damages. . . . Neither the critics nor supporters of punitive damages have any real systematic, factual basis for their claims. The storm warnings of the critics (as well as the all clear signals of the supporters) are based on anecdotes, horror stories and surveys of appellate decisions, all of which are guaranteed to produce a

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[24] In other words, including defense verdicts.

[25] Compare this higher average of punitive damage awards with other data set forth in Footnote 28 on p. 13 below. This may be attributed to the fact that South Carolina has, perhaps, the most liberal law on punitive damages of any of the 50 states. In South Carolina, a plaintiff is entitled to receive an award of punitive damages in any case in which the defendant's gross and willful conduct is a proximate cause of the plaintiff's injury.

[26] See p. 38 below.

distorted (unintentionally, we may assume) picture of things. The claims being made are akin to weather prognostications made on the basis of inspecting woolly worms, or watching to see if the groundhog sees its shadow, or reading the farmers' almanac." [27]

Reviewing the data that is available,[28] Daniels concluded that punitive damages, when awarded, usually come in cases involving motor vehicle accidents, personal violence, fraud, false arrest and bad faith on the part of insurance companies. He concludes as follows:

"Punitive damages appear more sporadically in other types of cases. . . . Interestingly, punitive damages are not awarded often in product liability or medical malpractice cases. . . ." [29]

Insurance Industry Profits

In a recent document released by the United States General Accounting Office, the Senior Associate Director of the General Government Division reports on the profitability of property/casualty insurance industry.[30] In this report he states as follows:

". . . Property/casualty companies have used a pricing strategy which sacrificed underwriting profit margins in order to generate cash for investment purposes. As a result of this strategy, the property/casualty industry has made, depending upon whose estimates are used, between $50 and $75 billion in net gains over the last 10 years. . . . Indeed, the industry itself is projecting substantial net gains over the next 5 years." [31]

As to the future outlook of the property/casualty industry, the report states as follows:

". . . Available industry estimates show that over the next 5 years the industry expects substantial net gains. Our calculations, made from the industry estimates, indicate an expected net gain before taxes of more than $90 billion over the years 1986–1990." [32]

TYPICAL PRODUCTS LIABILITY CASES

From my twenty years experience as a trial lawyer,[33] my own research and from discussions with other trial lawyers, I believe that the following are typical of products cases throughout the United States:

(a) Products cases involving personal injury or death

1. A teenage girl lost the ring finger on her hand as a result of the manufacturer's failure to equip its meat tenderizing machine with an interlocking safety device.[34]

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[27] Daniels, "Punitive Damages: Storm on the Horizon?", p. 5 (February 1986).

[28] In available data, punitive damages were awarded in only 1.6 percent of the cases in New York City, 2.2% of the cases in Cook County, Illinois, and 8.6% of the cases in Los Anageles County, California. The median award in Cook County, Illinois, is $8,800.

[29] Daniels, supra, Footnote 28 above, p. 15.

[30] Statement of Johnny C. Finch, Senior Associate Director, General Government Division, Before the Subcommittee on Oversight, Committee on Ways and Means, House of Representatives, On Profitability of the Property/Casualty Insurance Industry (April 28, 1986).

[31] Finch, supra, footnote 30 above, page 1. Hearing this, I am reminded of the quote generally attributed to the late Senator Dirksen in which he is reported to have stated: "A billion dollars here, a billion dollars there. Pretty soon we'll be talking big money."

[32] Finch, supra, footnote 30 above, p. 7.

[33] I have been involved in 19 of the 24 typical types of products cases listed below.

[34] Safety interlocking devices have been a part of the "state of the art" for more than 100 years. The first safety interlock was patented in 1868 (Patent No. 84,795 granted to Henry Carse of Pittsburgh, Pennsylvania). The first interlocking guard for a power press was granted in 1899 (Patent No. 618,064). By 1925, more than 75 safety interlocking devices had been patented in various applications. See, generally, Roberts, "Machine Guarding," (institute for Product Safety, 1980). In this particular case, the manufacturer of the meat tenderizing machine had failed to equip it with its own patented interlock, See U.S. Patent No. 2,346,686, attached at pages 65 through 66 below. At trial, a representative of the manufacturer testified that the machine was equipped with another type of safety interlock which had been subsequently removed from the machine. He further testified that they would never service the machine without replacing the safety interlock. However, in reply, plaintiff introduced three invoices from the defendant's service representative showing repair of the machine after the safety interlock had allegedly been removed.

2. A retired textile worker's leg was amputated as a result of rotary tiller manufacturer's failure to equip its machine with any one of its own three patented safety devices designed to prevent accidental activation of its reverse mechanism.[35]

3. A 15-year boy was killed when his bolt action .22 rifle "drop-fired" after falling from its wall rack. Incorporation of safety devices from any one of 37 different alternate safety designs going back to the Springfield rifle of World War I would have prevented this accident.[36]

4. A young man miraculously survived a perforated aorta from a richocheting "stud gun" [37] nail. This injury resulted from the failure of the manufacturer and of the equipment rental agency to whom the stud gun had been sold to adequately warn and instruct the plaintiff as to its proper use.

5. A young lady suffered a partial amputation of three fingers on her left hand from an unguarded pinch point on the ramp of a rental truck owned by a national rental agency. Adequate warning labels would have cost the rental agency approximately 17 cents per vehicle.

6. A textile worker lost his arm from failure of the manufacturer of a yarn twisting machine to provide emergency stop devices.[38]

7. A young, working mother lost two fingers on her right hand from failure of the manufacturer to provide "two hand controls" on a baling press.[39]

8. A 46-year-old lumber yard employee lost his leg in a wood chip conveyor which was not equipped with a "lockout" device [40] or accessible emergency stop controls.[41]

9. A college student was killed when an uninsulated auger boom on a motorized chicken feed dispenser contacting high voltage power line. That this hazard was reasonably foreseeable to the manufacturer is apparent from the available safety literature on the subject.[42] That this death was preventable by the manufacturer is apparent from patented "state of the art" insulating devices which were readily adaptable into the design of the auger boom.[43]

10. A 40-year-old father of two suffered second and third degree burns over eighty percent of his body in a salt bath explosion at an industrial plant resulting from a mislabeled barrel of citric acid supplied by a chemical manufacturer.

(b) Products liability cases involving commercial loss

1. A national manufacturer of PVC pipe manufactured and sold 100 miles of defective pipe to a Laurens County, South Carolina, water district.

2. A defectively designed "heat-exchanger" on the hydraulic system of a logging skidder rendered the $40,000 machine totally inoperable.

3. A chemical company sold a tank-truck load of defective yarn-winding emulsion to a textile dye plant, causing discoloration of thousands of spools of bleached yarn.

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[35] See U.S. Patent No. 4,011,913, U.S. Patent No. 4,023,429 and U.S. Patent No. 4,244,427 which are attached at p. 67 through 72 below.

[36] See list of 37 safety patents on bolt action rifles on 73 through 77 below.

[37] A "stud gun" is a tool used by building contractors to secure 2(4 "studs" to a concrete floor or wall.

[38] Emergency stop devices have been a part of the "state of the art" in the United States for more than 100 years. See, for example, Winter, "Stop Motion or Safety Brake for Machinery", U.S. Patent No. 289,949 (patented December 11, 1983). For other patented safety devices for textile machinery, see Roberts, supra, Footnote 34 above, p. 237-244.

[39] "Two hand controls . . . require the operator of a machine to use both hands during the machinery's cycle in order to prevent one or both hands from remaining at the point of operation. . . ." Roberts, supra, Footnote 30, page 245. Roberts lists 41 patents on two hand controls in various applications dating back to 1887. Some examples from Roberts' text are shown on pp. 78 through 82 below.

[40] Lockout devices allow conveyor maintenance personnel to padlock the main power control of the conveyor in the "off" position to prevent others from activating the conveyor during maintenance. There are required by the American Standard Safety Code for Conveyors, § 602, B20.1 (American Society of Mechanical Engineers 1957). See, also, "Accident Prevention Manual for Industrial Operations," p. 700, ¶ 1 (National Safety Council, 7th Ed., 1974).

[41] Emergency stop switches are required "at all points along the conveyor where potential hazards exist." See, § 11B of American Standards Safety Code for Conveyors (B.20.1 1957), supra, footnote 40 above.

[42] See, for example, "Rural Accident Prevention Bulletin—Electrical Safety on Farm and Ranch," (National Safety Council, July, 1975) which states in part as follows: "Overhead electrical hazards. Accident reports indicate that a large percentage of farm and ranch electrical injuries and fatalities result from contact with overhead electrical supply lines. Equipment commonly involved in such (word illegible) acts includes portable elevators and augers . . . because of the high voltage involved, resulting injuries from these mishaps usually are extensive and often fatal." See, also, U.S. Patent 2,950,016 and U.S. Patent 2,989,194 on pp. 83 through 87 below.

[43] See U.S. Patent 2,950,016 and U.S. Patent 2,989,194 on pp. 83 through 87 below.

4. An oil company changed the viscosity of its oil without notification to its customer, requiring expensive overhauls on a large number of tractor-truck rigs.

(c) Products liability cases of national implication

1. Despite hundreds of complaints from Chevette owners that they were almost killed as a result of breakage of the crankshaft pulley bolt, General Motors continued to crank out the cars without correcting this problem. As a result, a 67-year-old woman was killed when she lost control of her Chevette after crankshaft pulley bolt failure.[44]
2. The Ford park-to-reverse syndrome has killed hundreds.
3. The Dalkon Shield disaster resulted in thousands of unsuspecting women suffering septic abortions, pelvic inflammatory disease, perforated uteruses and infertility.
4. Butane lighter explosion has injured hundreds.
5. Formaldehyde "offgassing" has caused hundreds of cases of "trailer syndrome".
6. In the Pinto cases, the court concluded that Ford Motor Company had engaged in "a cost-benefit analysis balancing human lives against corporate profits" and had shown a "callous indifference to public safety." [45]
7. Toxic Shock Syndrome has killed or seriously injured hundreds.
8. Jeep roll-overs have killed or seriously injured thousands.
9. Asbestos manufacturers knew of the hazard of asbestos as early as the mid-1930's, but deliberately withheld this information from asbestos workers and the general public.[46]
10. Ford Mustang seat back collapses injured hundreds.

EFFECT OF KASTEN AND DANFORTH AMENDMENTS ON FUTURE LITIGATION

In many law offices across the country, including my own, there is a set of law books published by West Publishing Company entitled, "Words and Phrases." This set occupies fourteen linear feet of shelf space and contains 90 bound volumes. In it are excerpts from hundreds of thousands of appellate court cases which have attempted to interpret and apply statutory language similar to the ambiguities of the Kasten and Danforth Amendments. Passage of either version will bog our court system in a quagmire of endless appellate litigation for the next twenty-five years.

DESIRABILITY OF MAINTAINING ESTABLISHED PRINCIPLES OF THE COMMON LAW

(a) Trial by jury

The so-called "products liability reform" movement is, in reality, an attack upon our American jury system. Any reasonable assessment including accurate and reliable juror is basicaly conservative, fair, intelligent and conscientious. They were reasonable and intelligent enough to elect the members of this Committee to the United States Senate and they are reasonable and intelligent enough to pass upon the irreconcilable civil disputes of their fellow citizens by rendering jury service.

The finest aspect of the jury system is their ability to fairly consider all of the facts and all of the equities of each case, including all of those factors and principles which enter into every products case: foreseeability of injury, economic and mechanical feasibility of safety designs and devices, relative fault of both plaintiff and defendant, and the extent of the resulting injury. This system is far superior to any other system yet devised.

(b) The collateral source rule

The Collateral Source Rule has been developed by the considered wisdom of our American judicial system. It is fair. It is equitable and it should be retained. The system advocated by the so-called products liability reformers would reward the wrongdoer and punish the conscientious plaintiff who has the foresight to insure himself against catastrophic loss. He should not be penalized solely for the benefit of the insurance industry. Language of the Danforth Amendment would require a reduction not only for received benefits, but also for eligible benefits such as food

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[44] See memo on "Chevette Crankshaft Pulley Bolt Fiasco" on pages 88 through 97 below.

[45] *Grimshaw* v. *Ford Motor Company*, 119 Cal.App.3d 757, 174 Cal.Rptr. 348 (1981).

[46] See, for example, *Fisher* v. *Johns-Manville*, 193 N.J. Super. 113, 472 A.2d 577 (A.D. 1984) and *Johns-Manville* v. *Janssens*, 463 So.2d 242 (Fla.App. 1984). In the words of the arch-conservative Charleston News and Courier: "Executives of asbestos companies . . . surely had mothers who must have told them when they were children that it is always better to own up than to hide the truth." Editorial: "The Curse of Asbestos", Charleston News and Courier, September 14, 1982.

stamps and welfare, whether received or not. Plaintiffs with adequate life and medical insurance would receive no compensatioan whatsoever for their injuries.

(c) Joint and several liability

Joint and Several Liability is an equitable doctrine that has developed in the same manner as the Collateral Source Rule. Abolition of this principle would require the plaintiff to name as a defendant in any lawsuit any person upon whom the quilty defendant might otherwise attempt to lay the blame. The result would be a horrendous increase in litigation costs and an unmanageable free-for-all of finger-pointing in each case.

CONCLUSION

Basic concepts of the common law have served us well and should be retained. Before proceeding with any further attempt to overhaul existing products liability laws, this Committee needs to get the facts. Reliable and accurate jury verdict statistics will conclusively show that there is no products liability crisis.

[The following information was subsequently received for the record:]

FEW & GLENN,
Greenville, SC, June 2, 1986.

Senator ROBERT KASTEN,
U.S. Senate,
Washington, DC.

DEAR SENATOR KASTEN: As a spokesman for the injured victim of defective and unreasonably dangerous products, I am submitting the enclosed supplement to my testimony at the May 20th hearing of the Senate Commerce Committee. It covers generally the five principal fallacies upon which the products liability reform movement is based (pages 2-27) and provides examples of the exercise of the discretionary power and duty of the trial judge to reduce excessive jury awards (pages 27-34). I have attempted to outline for the benefit of the Committee the historical basis and justification for those six common law principles which your bill seeks to abolish (see list on pages 16-17 and discussion on pages 5-12). I have also attempted to trace the history of trial-by-jury for those of you who may wish to learn a little about this fundamental freedom before you abolish it (see pages 17-22).

I have also attempted to show by specific reference the basic unfairness of both your bill and Senator Danforth's bill, both of which are heavily biased in favor of industry and against the consumer and the injured victim (see pages 22-27). Of particular interest is your treatment of what you refer to as the "unacceptably high transaction costs of the product liability system," where you have limited the victim's attorneys' fees, but not the product manufacturer's. You and the other members of the Committee may be interested in my suggestion as to how you could reduce the other side of these "transaction costs" by limiting the product manufacturer's attorneys' fees using the same approach you have used to limit the victim's attorneys' fees (see ¶ 5(a)[6] on pages 24-25).

I realize that many members of the Committee will not have the time or inclination to read this. But for the sake of all those potential victims whose rights you would so rudely remove, I hope that each of you will.

I thank you for your courtesy.

Sincerely yours,

J. KENDALL FEW.

Enclosure.

SUPPLEMENTAL STATEMENT OF J. KENDALL FEW

"Products liability reform" [1] has been called [2] the "great cause" [3] of the 1980's. In reality, however, the products liability reform movement is no more than a cruel hoax [4] perpetrated upon the public by the insatiable greed of the liability insurance industry.[5] The products liability reform movement and the proposed "Products Liability Reform Act" are a cruel hoax because they are based on the following fallacies: [6]

1. The fallacy of an explosion in the number of products cases [7] and an epidemic of "huge and irrational courtroom damage awards." [8]

2. The fallacy that products liability law lacks uniformity [9] and imposes liability without fault on the product manufacturer.[10]

3. The fallacy that pending products liability proposals will lower litigation costs [11] and expedite the disposition of products cases.

4. The fallacy that would abolish or severely limit well considered common law principles such as the collateral source rule, joint and several liability, liability for defective and unreasonably dangerous products and the right to trial by jury.

5. The fallacy that various versions of the co-called Products Liability Reform Act are fair to the American public.

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[1] "Reform" is a word of many definitions. For example, the "Random House Dictionary of the English Language" (Unabridged Edition 1973) defines the word both as to "improve by alteration" and to "put an end to". The latter appears to be the more accurate here because "products liability reform" proposals currently pending would constitute a substantial step toward "putting an end to" manufacturers' liability for personal injury caused by defective and unreasonably dangerous products. To many, reform means no more than to take a bone away from someone else's dog and give it to their's.

[2] Primarily by products liability insurance companies, manufacturers of defective and unreasonably dangerous products and related groups.

[3] "Great causes," like "great cases," often make "bad law". As Justice Oliver Wendall Holmes said in his famous dissenting opinion in *Northern Securities Co.* v. *United States*, 193 U.S. 197, 400 (1904): "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

[4] A "mischievous deception," see "Random House Dictionary of the English Language," supra, Note 1, page 672. "Hoax" is short for "hocus" as in "hocus-pocus," a "juggler's trick," according to Skeat, "A Concise Etymological Dictionary of the English Language," p. 243 (1963). See also, "Bartlett's Familiar Quotations," p. 414b, Note 4 (14th Ed., 1968). The term is particularly appropriate here in light of the products liability reformers' tendency to "juggle" their figures to justify this sweeping deprivation of the long established rights of the people.

[5] The term "insatiable greed" appears appropriate when applied to an industry which has made $75 billion in profits over the last ten years. See Testimony of Johnny C. Finch, Senior Associate Director, General Government Division, United States General Accounting Office, Before the House Ways and Means Committee (April 28, 1986). According to a recent news report based on studies by the Association of State attorneys General and the Consumer Federation of America, the "insurance industry caused its own trouble." See p. 36 below. According to another recent news report by the Associated Press, the liability insurance industry is also guilty of "industry blackmail". See p. 37 below.

[6] Misleading or unsound arguments or proposals, see "Random House Dictionary," supra, Note 1, p. 512.

[7] Senator Kasten refers to the "products liability explosion". See Congressional Record—Senate S-5107 (April 30, 1986). In fact, tort filings increased by nine percent from 1978 through 1984, while the population increased eight percent according to the National Center for State Courts.

[8] Senator Kasten, Congressional Record, supra, Note 7, S-5107. Also, "Runaway Damage Verdicts" S-5108. Senator Kasten also states that between 1974 and 1985 "the average jury verdict in products cases increased form under $400,000 to over $1.8 million." S-5107. The only comprehensive, accurate jury verdict statistics available do not support any of these statements.

[9] Senator Kasten refers to "a lack of uniformity and clarity in rules of law relating to design and warnings on products." Congressional Record, supra, Note 7, at S-5108. In fact, 46 states have adopted § 402A of the Restatement of Torts, 2d providing for liability for defective and unreasonably dangerous products. For an analysis of the unfairness and "lack of uniformity" of the Kasten bill on this issue, see ¶ 5(a)[2] on pp. 22-23 below.

[10] See proposed findings in § 2(a)4 of the Kasten Amendment (Administration Bill). Liability under § 402A of Restatement of Torts, 2 d is based on the manufacture and sale of a defective and unreasonably dangerous product, which is the equivalent of liability based on fault. See, Prosser, "Assault Upon the Citadel (Strict Liability to the Consumer)", 69 Yale Law J. 1099, 1114-15 (1960). See, also, p. 10 below.

[11] The Kasten Amendment (Administration Bill) refers to this as "the unacceptably high transaction costs of the products liability system." S-5106, supra, Note 7. For an analysis of the unfairness of the Kasten bill on this issue, see ¶ 5(a)[6] on pp. 24-25 below.

Philosophical differences aside, it is apparent that those who propose and support this legislation have absolutely no conception of the historical basis[12] and significance of those well-founded common law principles they now seek to abolish and, what is worse, they have no earthly idea of the practical effects that this legislation would have. It is my purpose in providing this supplemental testimony to give the Committee some insight into these two very important matters.

1. The fallacy of an explosion in the number of products cases and an epidemic of "huge and irrational courtroom damage awards." Regrettably, only two members of the Committee were present when the distinguished Chief Justice of the Supreme Court of Virginia, Justice Harry L. Carrico, testified on this very important subject. Fortunately, however, his testimony is in the record and a copy of the report of the National Center for State Courts is also included in my testimony.[13]

As to the "hocus-pocus" figures on average jury verdict awards in products cases,[14] all fair-minded, rational observers know that these figures are flagrantly false. Assistant Attorney General Willard admitted as much in his testimony under examination by Senator Hollings.[15] We expect to have accurate, comprehensive jury verdict statistics for South Carolina to provide to this Committee by late 1986 or early 1987.[16] To proceed to pass legislation based on statistics known to be false would constitute a gross abuse of the legislative process.

2. The fallacy that products liability law lacks uniformity and is not based on fault on the part of the manufacturer. The three legal theories upon which almost all products cases are based are (a) negligence, (b) breach of implied warranty, and (c) liability for manufacture and sale of defective and unreasonably dangerous products.[17]

Negligent design and manufacture. The origin of the principle that a merchant shall be responsible for damages caused by his negligence dates back to the Magna Charta.[18] In the United States, manufacturers have been liable to consumers for foreseeable injury caused by negligent design and manufacture of defective products for the past seventy years.[19] All 50 states now uniformly apply this principle.[20]

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[12] In the development and refinement of a principle of the common law on a case-by-case basis over a period of many years, common law judges have the obligation and opportunity to continuously consider (and reconsider) (a) how and why a principle of law developed, (b) what goals it seeks to accomplish, and (c) what practical effect will have in a wide range of difference situations. Under the common law, gradual and beneficial changes in established rules of law occur as the needs of society change, but only after careful consideration of the consequences or "side effects" of each such change. This requires a proper understanding of the historical basis of each such rule of law and a proper appreciation of the practical effect of its amendment or ablition. See generally Cardozo, "The Growth of the Law" (Yale University Press, 1924) and Pound, "The Spirit of the Common Law" (1921).

[13] See Senate Commerce Committee Transcript, Hearing Reference No. 79, pp. 177-178 (May 20, 1986) and a report of the National Center for State Courts in my prepared testimony presented at that hearing on pp. 4-5 and 23-29.

[14] See footnote 8 above.

[15] See Hearing Transcript, supra, note 13, pages — through — and my prepared testimony on pages 5 through 10.

[16] See Hearing Transcript, supra, note 13 pp. 178-80 and my prepared testimony at pp. 10-12.

[17] Although § 402A of the Restatement of Torts, 2d is commonly referred to as "strict liability", it only applies to products which, at the time of manufacture or sale, are defective and unreasonably dangerous. Comment i. specifically states that "the rule stated in this section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. . . ."

[18] The Magna Charta, granted June 15, 1215, "is justly regarded as the foundation of English constitutional liberty." *Black's Law Dictionary*, page 858 (5th Ed., 1979). It provides: "A free man shall be amerced [assessed damages] for a small fault according to the degree of the fault; and for a greater crime according to its magnitude . . . *and a merchant in the same manner* . . . by the oath of faithful men of the neighborhood [a common law jury]." Magna Charta IX (20). See *Magna Charta* (Legal Classics Library 1982, page 51). Under early English common law, every tort was regarded as a punishable offense. Pollock & Maitland, *The History of English Law*, Vol. 2, page 517 (2nd Ed., 1899). While the process of development of a civil action for damages developed "only by slow degrees" [Pollock & Maitland, Vol 2, page 511], even under early English common law, damages were assessed "in accordance with the gravity of the offense." Pollock & Maitland, Vol. 2, page 513.

[19] See opinion of Justice Cardozo in *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). Justice Cardozo has been referred to as "likely the greatest legal mind of this century". See publisher's Preface to *Cardozo on the Law* (Legal Classics Library, 1982).

[20] *Restatement of Torts, 2d*, § 395, by the American Law Institute provides that "a manufacturer who fails to exercise reasonable care in the manufacture of a [product] . . . involving an unreasonable risk of . . . physical harm . . . is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied." According to the

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Negligent failure to warn. Virtually all states currently impose liability on manufacturers for injuries caused by their negligent failure to warn consumers of the dangerous nature or condition of their products.[21]

Breach of Implied Warranty. The Uniform Commercial Code, adopted in all 50 states, provides that manufacturers shall be liable to consumers for injuries resulting from breach of an implied warranty that their products are reasonably fit for the purpose for which they are intended.[22] This has been the rule of law in civilized societies since the adoption of the Code Napoleon.[23]

Liability for defective and Unreasonably Dangerous Products. The American Law Institute was founded in February of 1923 for the purpose of "preparing a restatement of the principles of the common law."[24] Through its efforts, between 1934 and 1939, the first edition of the Restatement of Torts emerged. Work on the second edition of the Restatement of Torts began in 1952. Advisers for this edition included a distinguished group of judges, law professors and lawyers headed by Dean William L. Prosser of the University of California Law School, author of the leading treatise in the field of torts.[25] As a result of their efforts, the Restatement of Torts, 2d was approved by the American Law Institute in 1963 and § 402A was adopted in 1964.[26]

Restatement of Torts, 2d, § 402A, commonly referred to as "strict liability," provides that "one who sells any product in a defective condition unreasonably dangerous to the consumer . . . is subject to liability for physical harm . . . to the ultimate user or consumer" under certain conditions. These conditions include the requirement that the seller "is engaged in the business of selling such a product" and that the product reaches the consumer "without substantial change in the condition in which it is sold." [27] The "seller" under § 402A includes the manufacturer of the product, the wholesaler and the retailer.[28] The basis for this rule is found in early English common law.[29]

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reporter's notes, this rule, based on *MacPherson* v. *Buick*, supra, Note 19, "is now all but universally accepted in the United States." See Appendix to *Restatement of Torts, 2d*, § 395, page 416. "Mississippi was perhaps the last jurisdiction to accept *MacPherson*". Frumer & Friedman, *Products Liability*, § 5.03[1], page 26, citing *Stone Mfg. Co.* v. *Hodges*, 189 So.2d 113 (Miss. 1966), *cert. den.* 386 U.S. 912 (1967).

[21] *Restatement of Torts, 2d*, § 388, adopted by the American Law Institute provides that "one who supplies . . . a [product] for another to use is subject to liability . . . for physical harm . . . if the supplier . . . has reason to know that the [product] is . . . likely to be dangerous for the use for which it is supplied. and . . . fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous." For authorities supporting this rule, see Appendix to *Restatement of Torts, 2d*, § 388, and Frumer & Friedman, *supra*, Note 20, § 8.

[22] *Uniform Commerical Code*, § 2-315, provides that "where the seller . . . has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose." Compare this with similar language of the *Code Napoleon* in footnote 23 below.

[23] Section 1641 of the *Code Napoleon*, adopted in France in 1804, provides that "the vendor is bound to warranty by reason of concealed defects in the thing sold which render it unfit for the use to which it is destined. . . ." Implied warranties under English common law have existed for more than 200 years. See *Blackstone's Commentaries on the Laws of England*, Vol. III, page 158, which states that implied contracts "are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform; and, upon this presumption, makes him answer to such persons, as suffer by his nonperformance." See, also, *Blackstone*, Vol. III, page 165, which states: "In contracts for provisions it is always implied that they are wholesome; and, if they be not, the same remedy may be had. Also if he, that selleth any thing, doth upon the sale warrant it to be good, the law annexes a tacit contract to this warranty, that if it be not so, he shall make compensation to the buyer: else it is an injury . . . for which an action . . . will lie to recover damages." See Footnotes 29 and 30 below showing the relationship of these ancient principles to the development of § 402A of the *Restatement of Torts, 2d*.

[24] See Cardozo, "The Need of a Scientific Restatement as an Aid to Certainty", pages 6-9, in Cardozo, *The Growth of the Law* (Yale University Press, 1924). See, also, Cardozo, "The American Law Institute", page 121, fn 1, in *Law and Literature and Other Essays and Addresses of Benjamin N. Cardozo* (1931).

[25] *Prosser & Keeton on the Law of Torts* (5th Ed., 1984).

[26] See Introduction to *Restatement of Torts, 2d*, page vii.

[27] *Restatement of Torts, 2d*, § 402A(1) (a) and (b).

[28] The rule stated in this section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, [and] to any wholesale or retail dealer or distributor. . ." *Restatement of Torts, 2d*, § 402A, *Comment f.*

[29] Since the early days of the common law, those engaged in the business of selling food intended for human consumption have been held to a high degree of responsibility for their products. "As long ago as 1266, there were enacted special criminal statutes imposing penalties on . . . persons who supplied 'corrupt' food and drink." *Restatement of Torts, 2d*, § 402A, *Comment b.*

Prior to the adoption of § 402A by the American Law Institute in 1964, a number of American jurisdictions had extended the common law rule imposing liability for defective and unreasonably dangerous products to any product which could be expected to cause physical harm to the consumer.[30] The policy considerations supporting this rule are as follows:

"The justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; [and] that the public has the right to and does expect . . . that reputable sellers will stand behind their goods. . . ."[31]

The adoption of this "strict liability" rule of § 402A of the Restatement of Torts, 2d, by 46 of the 50 United States is the bais for the fallacious argument of the products liability reformers that manufacturers are now subject to liability without fault. But how is it that a manufacturer who produces a defective and unreasonably dangerous product can properly claim to be free from negligence and without fault? The answer lies in the "hocus-pocus" logic of the liability insurance industry.

In the words of Dean Prosser, once the consumer proves the manufacturer's product to be defective and unreasonably dangerous, the negligence of the manufacturer logically follows:

"Where the action is against the manufacturer of the product, an honest estimate might very well be that there is not one case in a hundred in which strict liability would result in recovery where negligence does not. When a negligence action is brought against a manufacturer, the plaintiff is faced with two initial tasks. One is to prove that his injury has been caused by a defect in the product. The other is to prove that the defect existed when the product left the hands of the defendant. . . . Once over these two hurdles, the plaintiff has a third task, to prove that the defect was there because of the defendant's negligence. This is by far the easiest of the three, and it is one in which the plaintiff almost never fails." [32]

The true purpose of strict liability in tort is to protect the injured consumer from the absent, unknown or insolvent manufacturer by providing a means of recovery in such cases against the wholesaler or retailer of defective and unreasonably dangerous products.[33] The claim that manufacturers of products may be liable without fault is absolutely false.

Uniformity of Products Liability Law. Contrary to the claims of products liability reformers,[34] this analysis of the standard theories of recovery in products cases clearly shows that there is a high degree of uniformity in the basic principles of products liability law in the United States:

(a) All 50 states recognize a manufacturer's liability for negligent design and manufacture of defective products.[35]

(b) Virtually all jurisdictions recognize a manufacturer's liability for failure to warn of the dangerous nature or condition of its product.[36]

(c) All 50 states recognize a manufacturer's liability for breach of an implied warranty of fitness of its product for a particular purpose.[37]

(d) Forty-six of 50 states recognize a manufacturer's liability for defective and unreasonably dangerous products.[38]

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[30] "Recent decisions, since 1950, have extended this special rule of strict liability beyond the seller of food for human consumption . . . beginning in 1958 . . . a number of recent decisions have . . . extended the rule of strict liability to cover the sale of any product which, if it should prove to be defective, may be expected to cause physical harm to the consumer . . ." *Restatement of Torts, 2d,* § 402A, *Comment b.* Forty-six states have adopted strict liability, see Note 38 below.

[31] *Restatement of Torts, 2d,* § 402A, *Comment c.*

[32] Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)", 69 *Yale Law J.* 1099, 1114 (June, 1960).

[33] ". . . There are other sellers than the manufacturer of the product. It will pass through the hands of a whole line of other dealers. . . . The manufacturer is often beyond the jurisdiction. He may even, in some cases, be unknown. . . . The manufacturer . . . may turn out to be a small concern, operating on a shoestring, and financially the least responsible person in the whole chain of distribution. If the plaintiff is to recover at all, he must often look to the wholesaler, the jobber, and the retailer." Prosser, *supra,* Note 32, pages 1116-1117.

[34] See Footnote 9 on page 3 above.

[35] See Footnote 20 on page 6 above.

[36] See Footnote 21 on page 7 above.

[37] See text on p. 7 at Footnote 22 above.

[38] See pages 8 through 11 above. The four states which have not adopted strict liability are Massachusetts, North Carolina, Virginia and Wyoming.

This claimed, yet unsupported, lack of uniformity is simply a hoax, a clever ruse to hide the real purpose of the products liability reform movement: to deprive the American public of fundamental rights of ancient origin in order to satisfy the insatiable greed of the liability insurance industry.[39]

3. The fallacy that pending products liability proposals will lower litigation costs and expedite the disposition of products cases.

The practical effects of eliminating joint and several liability. Both the Kasten[40] and the Danforth[41] proposals would eliminate the Doctrine of Joint and Several Liability in products cases. Under both bills, the manufacturer's responsibility for resulting damages would be reduced by the pro-rata fault of both parties and non-parties. The practical effect of such provisions would be to encourage the manufacturer to point the blaming finger in each case in as many directions as possible and to force the plaintiff to add all of them as parties to the action. This will inevitably result in skyrocketing litigation costs and inordinate delays in the litigation process. Here are some real-life examples:

(a) The case of the unreasonably dangerous roto tiller.[42] In this case, the roto tiller caused a puncture wound in the plaintiff's leg. He was treated at a local hospital and released. Later, he was readmitted and his leg was amputated. Our investigation revealed insufficient grounds to proceed against the doctor or the hospital. Therefore, we proceeded against only against the negligent manufacturer and the retailer, and a reasonable settlement was reached within a few months of filing suit. With the abolition of joint and several liability as provided in the Kasten and Danforth bills, both defendants would have attempted to case all or part of the blame for the loss of plaintiff's leg on the doctor and the hospital, requiring the plaintiff to name them as parties. This would have been necessary to allow the plaintiff to recover against them in case the jury found them partially responsible. Therefore, there would have been four sets of defense lawyers instead of only two with a significant resulting increase in "transaction costs"[43] and inevitably delays. In all probability, no settlement would have been reached and a very long, tedious trial would have resulted.

Similar results would have followed in the case of the amputated finger[44] and in almost any other case where product related injuries are followed by less than optimum medical care.

(b) The unreasonably dangerous wood chip conveyor.[45] In this case, suit was filed against the manufacturer of the wood chip conveyor only. A settlement followed shortly after suit. With the abolition of joint and several liability, the negligent wood chip manufacturer would have attempted to shift a portion of the blame to the engineer who designed the wood chip facility, the contractor who built it, and the subcontractor who installed the electric wiring. To protect the plaintiff, all would have been made parties and the resulting "free-for-all" would have been an absolute disaster.

(c) Component part cases. In almost all cases involving defective component parts, it will be necessary to name numerous additional defendants if joint and several liability is abolished. More defendants always means protracted litigation and higher "transaction costs". This assumes that the component part manufacturer is subject to the jurisdiction of the state in which the injury occurred. If not, upon a finding by a jury that the component part manufacturer was wholly or partially responsible, the injured plaintiff would be forced to travel to some foreign jurisdiction and sue him there. As the prior judgment would not be binding on this absent defendant, the whole case would have to be relitigated with the possibility of inconsistent

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[39] See Footnote 5 on page 2 above.

[40] Section 6(a) of the Kasten bill provides that, except for defendants found to be "acting in concert", the doctrine of "joint and several liability may not be applied to any product liability action." It further provides that a manufacturer "may not be found liable for damages attributable to the pro-rata share of fault . . . of any other person (without regard to whether that person is a party to the action) . . ." See Congressional Record-Senate S-5107 (April 30, 1986).

[41] Section 307 of the Danforth bill abolish joint and several liability in favor of system of "comparative responsibility" with the manufacturer's liability for damages reduced by the proportionate fault of "all parties, including the claimant, and any non-parties responsible to any extent for the harm. . . ." Congressional Record-Senate S-5879 (May 13, 1986).

[42] See my prepared Testimony at the May 20, 1986, hearing, page 15, ¶ 2, and Footnote 35.

[43] "The unacceptably high transaction costs of the product liability system, in which almost twice as much money goes to attorneys' fees and litigation expenses as to compensate victims, is a burden on the consumer and American industry which can no longer be tolerated." Kasten Amendment, § 2(a)(7). Congressional Record-Senate S-5106 (April 30, 1986).

[44] See prepared Testimony, *supra*, Note 42, page 15, ¶ 1 and Footnote 34.

[45] See prepared Testimony, *supra*, Note 42, page 17, ¶ 8 and Footnotes 40 and 41.

verdits: a jury in South Carolina may find the Michigan manufacturer faultless and the absent California component part manufacturer fully responsible, while a subsequent California jury may find the previously-absolved Michigan manufacturer entirely responsible and the California component part manufacturer faultless. As a result, although both juries would have found favorably for the plaintiff, the plaintiff would recover nothing. Is that fair? Does that make sense?

The practical effect of caps on damages. The Kasten bill would limit so-called "non-economic damages" to $100,000.[46] The effect of this provision would be to virtually eliminate settlements. Under existing law, the plaintiff knows he may recover nothing. The defendant knows the jury may return a full verdict. Both have incentive to settle. With a cap, the defendant has no incentive. No insurance company will offer $100,000 if that is their maximum exposure. Instead, they will offer a maximum of $50,000 and almost all cases will go to trial with the resulting substantial increase in "transaction costs" and considerable delays in the disposition of cases.

4. The fallacy justifying abolition of well-considered common law principles. Masquerading under the disguise of "reform" [47] the liability insurance industry would have this Committee and the Congress of the United States abolish or severely limit the following existing common law doctrines:

(a) The collateral source rule.[48]

(b) Joint and several liability.

(c) Liability for negligent design and manufacture of products.

(d) Liability for negligent failure to warn.

(e) Liability for breach of implied of warranty of fitness for a particular purpose.

(f) Liability for manufacture and sale of defective and unreasonably dangerous products.

Yet the sacrifice of these six common law principles solely for the benefit of the liability insurance industry is not the main purpose of the products liability reform movement. Their main purpose is to strike at the very cornerstone of our Constitutional freedoms, the right to trial by jury.

An Epitaph to the Right of Trial by Jury. Born in Britain in or before the 5th Century A.D., raised in the hearts and minds of our Saxon ancestors prior to Norman conquest, christened at Runnymede, England, June 15, 1215, and consecrated in the 7th Amendment of our sacred Constitution. A survivor of civil war, economic depression, two world wars and 200 years of American freedom and progress. Died June 3, 1986, in the Senate Commerce Committee, Senate Russell Building, Room 257, Washington, D.C. Rest in Peace. (Hopefully, this will not occur.)

Before this Committee executes the right of trial by jury, perhaps it will pause a moment to consider its noble history from the pages of *Blackstone's Commentaries:* [49]

". . . [T]rial by jury . . . has been used time out of mind in this nation [England], and seems to have been coeval with the first civil government. Some authors . . . trace the origin of juries . . . [to] the Britons [50] themselves, the first inhabitants of our island; but certain it is, that they were in use among the earliest Saxon [51] colo-

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[46] Kasten Bill, § 7(a). Congressional Record-Senate S-5107 (April 30, 1986).

[47] See Footnote 1, page 1 above.

[48] The equitable doctrine known as the Collateral Source Rule recently celebrated its bicentennial birthday. From *Mason* v. *Sansburg*, 3 Douglas 61 (Eng. 1782) and *Yeates* v. *White*, 132 Eng.Rep. 793 (Eng. 1838), it was adopted in the United States in *Propeller Monticello* v. *Mollison*, 58 U.S. 152 (1854) and *Althorfe* v. *Wolfe*, 22 N.Y. 355 (1860). It is now almost universally followed in the United States. See *Restatement of Torts, 2d*, § 920A, *Comment b.*, by the American Law Institute, which provides as follows:

"*Benefits from collateral sources* . . . It is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor. If the plaintiff was himself responsible for the benefit, as by maintaining his own insurance or by making advantageous employment arrangements, the law allows him to keep it for himself. . . . One way of stating this conclusion is to say that it is the tortfeasor's responsibility to compensate for all harm that he causes. . . ." See, also, *Annotation*: "Collateral Source Rule: Hospital or Medical Insurance", 77 ALR3d 415 (1977).

[49] *Blackstone's Commentaries on the Laws of England* (Oxford, England 1765–1769).

[50] Celtic tribes, known as "Britons," crossed the English Channel and settled in Britain between 700 and 200 B.C. See *Enclopedia Britannica, Macropedia*, Vol. 3, pages 193–197, and *Micropedia*, Vol. II, page 285.

[51] Following the Roman conquest of Britain between 43 and 80 A.D., Germanic tribes known as Saxons settled in southern and eastern Britain between 430 and 600 A.D. See *Enclopedia Britannica, Macropedia*, Vol. 3, pages 198–199 Saxon kings united Britain in 927 A.D. See Note 52 below.

nies. . . . [W]e may find traces of juries in the laws of . . . Germany, France, and Italy; who had all of them a tribunal composed of twelve good men and true . . ., being the equals or peers of the parties litigant. . . . In England we find actual mention of them so early as the laws of King Ethelred,[52] and that not as a new invention. . . . [W]e are apt to impute the invention of [juries] . . . to the superior genius of Alfred the Great.[53] . . . Its establishment . . . in this island . . . was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it. In [the] Magna Charta it is [called] . . . the principal bulwark of our liberties . . . and it was ever esteemed, in all countries, a privilege of the highest and most beneficial nature.[54]

". . . Trial by jury has ever been, and I trust ever will be, looked upon as the glory of the English law . . . . It is the most transcendent privilege which any subject can enjoy . . . [It has] secured the just liberties of this nation for a long succession of ages. And [those who claim] . . . that because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta, and Carthage, were strangers to . . . trial by jury."[55]

"So that the liberties of England cannot but subsist, so long as [trial by jury] remains sacred and inviolate, not only from all open attacks but also from all secret machinations, which may sap and undermine it, by introducing new and arbitrary modes of trial, by justices . . ., commissioner . . ., and courts of conscience. And however convenient these may appear at first, (as doubless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon the sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution; and that, through begun in trifles, the precedent may gradually increase and spread, to he utter disuse of juries in questions of the most momentous concern."[56]

Hear, also, what others have said of the ancient right of trial by jury:

(a) Sir John Fortescue (1385–1479). Chief Justice of the King's Bench, author: "In Praise of the Laws of England", (c. 1470):

". . . By the laws of England, the truth of the matter cannot appear to a judge, but [only] upon the oath of twelve men of the neighborhood, a method which is to be esteemed as the most rational and effectual [method] for discovering the truth."[57]

(b) Sir Edward Code (1552–1634). Chief Justice of the Court of Common Pleas and author of "Coke's Institutes of the Laws of England" (1628):

". . . The institution and right of this trial by twelve men . . . excels other . . . this trial of the fact . . . is very ancient: for here . . . the law was before the conquest. . . .

". . . Nor is it any small merit in this arrangement . . . to have the benefit of a trial, in which the judge and jury are a check upon each other; and that this benefit may always be enjoyed. . . . Thus considered, the distinction between the office of judge and jury seems to claim our utmost respect. May this wise distribution of power between the two long continue to flourish, unspoiled. . . ."[58]

(c) Pollock & Maitland, "The History of English Law" (2nd Ed., 1899):

[Of trial by jury:] "We may say that it suited Englishmen well; it became a cherished institution and was connected in their minds with all those liberties that they held dear. . . ."[59]

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[52] Sixth in a line of Saxon kings of a united Britain beginning with King Athelstan (927–939 A.D.), "Ethelred the Unready" reigned from 978 to 1016 A.D. See *Enclopedia Britannica, Macropedia*, Vol. 3, pages 203–204.

[53] Alfred the Great, Saxon king of Wessex in southwest Britain from 871 through 899 A.D., is credited with saving England from conquest by the Danes, with the revival of learning in Britain, and with the compilation of the Dome-book or *Liber Judicials* which contained, according to Blackstone, "the principal maxims of the common law." *Blackstone's Commentaries*, Vol. I, pages 64–65; *Black's Law Dictionary*, page 434 (5th Ed., 1979).

[54] *Blackstone's Commentaries*, Vol. III, pages 349–350.

[55] *Blackstone's commentaries*, Vol. III, page 379.

[56] *Blackstone's Commentaries*, Vol. IV, pages 343–344.

[57] Fortescue, "In Praise of the Laws of England", Chapter XX, page 64 (c. 1470).

[58] *Coke's Institutes of the Laws of England*, Vol. I, § 234, page 155b (1628). Cases collected in 21 recent annotations in which judges have exercised their inherent discretionary powers to reverse or reduce jury verdicts in products and other personal injury cases are discussed on pages 27–34 below.

[59] Pollock & Maitland, "The History of English Law," Vol. II, page 629 (2nd Ed., 1899).

(d) Thomas Jefferson, author of our Declaration of Independence and third President of the United States:

"Equal and exact justice to all men, . . . freedom of religion; freedom of the press, . . . and trial by juries impartially selected. These principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation. The wisdom of our sages and the blood of our heroes has been devoted to their attainment. They should be the creed of our political faith . . .; and should we wander from them in moments of error or alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty, and safety." [60]

Pause a moment, if you will, before sacrificing the cornerstone of our freedom to the insatiable greed of the liability insurance industry.

5. The fallacy of fairness in the products liability reform movement. That both products liability reform proposals are heavily weighted in favor of industry [61] and against the injured victim is clearly demonstrated by the following illustrations:

(a) Kasten bill.

[1] The bill applies only to products liability actions for personal injury or death and not to actions by one commercial enterprise against another.[62]

[2] The bill abolishes or severely limits longstanding common law principles beneficial to the injured victim, including the collateral source rule, joint and several liability and liability of negligent design and manufacture, negligent failure to warn, implied warranty and strict liability. However, the bill retains all "applicable defense[s] or limitation[s] of state law." [63] So much for uniformity.

[3] The bill provides that no more than $100,000 of non-economic damages maybe recovered in any products action regardless of the circumstances.[64]

[4] The bill permits defendants who make payments of awards for future damages "periodically based on when the damages are found likely to occur" [65] even though applicable state law requires the jury to reduce future damages to their present cash value.[66]

[5] The Kasten bill abolishes the collateral source rule with respect to any payment or benefit by a health insurance program "funded in whole or in part by an employer." [67] Health insurance premiums are, in essence, payments by a prospective victim toward potential future health care costs. In other words, the health insurance payment is not a payment from a collateral source, it is payment by the injured victim himself in a series of increments over a period of years. Under the bill, even if the victim pays 90 percent of a health insurance premium, the defendant gets full credit for the payment. Is that fair? Obviously not.

[6] The Kasten bill refers to the "unacceptable high transaction costs of the products liability system" [68] and states [69] that "almost twice as much money goes to attorneys' fees and litigation expenses as to compensate victims." [70] As the standard contingent fee contract is approximately one-third,[71] it is reasonable to assume that the remaining "attorneys' fees and litigation expenses" goes to the defense lawyers.[72] Yet the only restrictions in the bill are on the victim's attorneys' fees. The bill provides for the victim's attorneys' fees to decrease as the recovery increases.[73] In other words, the better the results the victim's attorney achieves, the more he is penalized. In a typical case of a severely injured victim, the victim's attorneys' fees

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[60] Thomas Jefferson, First Inauguaral Address, *Bartlett's Familiary Quotations*, page 472 (14th Ed., 1968). The 7th Amendment to the United States Constitution, ratified December 15, 1791, provides for the right of trial by jury in civil cases: "In suits at common law . . . the right of trial of by jury shall be preserved. . . ." Most state constitutions have similar provisions.

[61] Primarily, the liability insurance industry.

[62] See Kasten bill, § 3(5), Congressional Record-Senate S-5106 (April 30, 1986).

[63] See Kasten bill, § 5(1) and 5(2). See, aso § 9(b) which preserves all state law reducing damage awards. Congressional Record, *supra*, Note 62, S-5106-07.

[64] Kasten bill, § 7(a). Congressional Record, *supra*, Note 62, S-5107.

[65] Kasten bill, § 8(a) Congressional Record, *supra*, Note 62, S-5107.

[66] See, *Am. Jur. 2d*, Damages, § 26-29.

[67] Kasten bill, § 9(b)(2) Congressional Record, *supra*, Note 62, S-5107.

[68] Kasten bill, § 2(a)(7), Congressional Record, *supra*, Note 62, S-5106 The word "transaction" would appear to cover both sides of the issue: *i.e.*, the victim's attorneys' fees and the product manufacturer's attorneys' fees.

[69] Without citation of source or authority.

[70] See Footnote 68.

[71] In my own experience, contingent fee contracts range from one-third to 40 percent.

[72] In my experience, the plaintiff usually has one lawyer and the defendant two or more.

[73] Section 10(a) of the Kasten bill provides for maximum contingent fees of 25 percent for the first $100,000 recovery, 20 percent for the second $100,000 recovery, 15 percent for the third $100,000, and 10 percent above $300,000. See Congressional Record, *supra*, Note 62, S-5107.

would be cut in half.[74] Why not apply the same logic to the insurance company's lawyers: cut their allowable fees an average of 50 percent depending upon the outcome, the better the result, the more their fees would be cut? Typical insurance lawyers are paid an average of approximately $100 per hour. Therefore, if they win the case outright, they would get only $25 per hour, but if they lose big, the could get as high as $75 per hour. The answer to this equally absurd proposition is that the best defense lawyers would not handle products cases. This is the same insidious purpose of the Kasten bill: to fix it so the best plaintiff's lawyers will not handle products cases and to take away all incentive toward maximizing recovery for the catastrophically injured victim of defective and unreasonably dangerous products.

(b) Danforth bill.

[1] As with the Kasten bill, the Danforth bill covers personal injury, only, and not "commercial loss."[75]

[2] The so-called "expedited settlement claim"[76] requires the claimant "under penalties of perjury"[77] to submit to the product manufacturer[78] "a detailed description of the product", "full information" regarding the occurrence and injury, copies of all medical bills and medical reports, a statement of ther claimant's employment history and earnings, copies of all witness statements[79] and the amount of all compensation received by the claimant. In addition, the claimant must "cooperate fully and expeditiously with the manufacturer" in its investigation,[80] promptly update all medical information, furnish copies of records of "any relevant medical treatment or examination of the claimant," [81] "submit [82] to a physical or medical examination, or both, by a health care provider specified and compensated [83] by the manufacturer," provide copies of all expert opinions [84] and "provide the manufacturer with a reasonable opportunity to inspect, photograph or test"[85] the product. What does the claimant get in return for baring his body and soul to the inquiring eyes of the product manufacturer and his liability insurance company? Nothing, absolutely nothing. No copies of quality control records, customer compliants, records of previous product injury, witness statements, or expert opinions. Nothing. Is that fair? You be the judge.

[3] Sanctions are imposed on a claimant's attorney who fails to act in good faith in the filing of an action, but no similar sanctions are imposed on a defense attorney who fails to act in good faiths asserting a defense.[86]

DISCRETIONARY POWER OF THE TRIAL JUDGE TO REDUCE THE AMOUNT OF JURY AWARDS

In the "hocus-pocus" statistics of the liability insurance industry, the punitive damages award in the famous California Pinto fire case is always listed as a $125 million. For some reason, they neglect to tell us that the trial judge reduced the award to $3½ million.[87] Under the longstanding common law procedure that Lord

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[74] In a case of catastrophic injury involving a recovery by the plaintiff of $450,000, attorneys' fees under a one-third contingent fee contract would approximate $150,000. Under the Kasten bill, they would be reduced to $75,000. See Footnote 73 above. In response to questions by Senator Ford, Assistant Attorney General Willard testified that he was not generally in favor of wage and price controls, but that he was in this case. See Transcript, page . In truth, he appears to favor it in this case only as it applies to the victim's attorneys' fees, but not as it applies to the product manufacturer's attorneys' fees.

[75] Danforth bill, § 103(a), Congressional Record-Senate S-5875 (May 13, 1986).

[76] See § 203, Congressional Record, supra, Note 75, S-5876. In my judgment, these provisions are colossally cumbersome, absolutely unworkable and will expedite nothing.

[77] Danforth bill, § 203(b)(6), Congressional Record, supra, Note 75 S-5876.

[78] And to "promptly update during the course of the product manufacturer's investigation."

[79] "Where practical", whatever that means. See § 203(b)(7).

[80] For those of us who know the method of operation of insurance companies, this means that the plaintiff must bare both body and soul to the inquiring eyes of an army of insurance company investigators.

[81] To an inquiring insurance adjustor, this means all medical records from the cradle to the grave.

[82] An appropriate word indeed.

[83] Health care providers compensated by manufacturers and liability insurance companies tend to realize upon which side their bread is buttered.

[84] Only the claimant, but not the manufacturer is required to submit copies of expert opinions.

[85] Product manufacturers *always* require that the testing be done of their *own* facility.

[86] Section 308(b), Congressional Record, *supra*, Note 75, S-5879.

[87] See *Grimshaw* v. *Ford Motor Co.*, 119 Cal.App.3d 757, 174 Cal.Rptr. 348 (1981), a case in which the court concluded that Ford Motor Company had engaged in "a cost-benefit analysis balancing human lives against corporate profits" and had shown a "callous indifference to

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Coke refers to as a "wise distribution of power" in which "the judge and jury are a check upon each other",[88] the trial judge has both the power and the duty to set aside or reduce [89] the amount of any verdict which the trial judge considers to be excessive.[90] For those who are interested in learning the whole truth of the matter,[91] there are no less than 21 recent Annotations [92] on the subject:

1. "Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases", 35 ALR4th 441 (1985), which includes a collection of 39 appellate court decisions from 22 states and the District of Columbia in which various jury awards for punitive damages were reversed or reduced as being excessive.[93] It is interesting to note that 38 of these 39 "huge and irrational" [94] punitive damages awards were for less than $50,000.[95] It is also interesting to note that three of these cases were from Senator Kasten's home state of Wisconsin [96] and five were from Senator Danforth's home state of Missouri.[97]

2. "Excessiveness or adequacy of damages awarded for injury to trunk or torso, or internal injuries", 16 ALR4th 238 (1982).[98]

3. As to damage awards for particular diseases and conditions, 16 ALR4th 736 (1982).[99]

4. As to damage awards for injuries to sensory or speech organs, 16 ALR4th 1127 (1982).[100]

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public safety." The court concluded that the evidence in that case "had a tendency in reason to prove that Ford's failure to correct the Pinto's fuel design system defects, despite knowledge of their existence, was deliberate and calculated" 174 Cal.Rptr. 368.

[88] See quote from Lord Coke on page 21 at Footnote 58 above.

[89] On motion for a new trial, the trial judge has the discretion to grant a conditional new trial or a new trial *nisi* unless the plaintiff agrees to remit [reduce] a portion of the verdict. The practical effect of this procedure is to grant the trial judge with discretionary power to reduce the verdict.

[90] See 66 *C.J.S.*, New Trial, § 76, page 241, which states: "As a general rule, the fact that the jury . . . have given excessive damages is ground for a new trial, and the trial court has both the power and the duty, where a new trial is sought on this ground, to determine whether the damages awarded to plaintiff are excessive so as to warrant a new trial." That would include all of the "huge and irrational courtroom damage verdicts we hear about almost daily" according to Senator Kasten. See Congressional Record—Senate S-5107 (April 30, 1986). One reason that we don't hear so much about discretionary reduction of verdicts by the trial judge is because that is not the stuff of which newspapers are sold. Another reason is that is does not suit the purposes of the liability insurance companies' propaganda campaign. They sometimes tell the truth, but seldom, if ever, the whole truth.

[91] By definition, that would exclude the Administration's "working group" on "tort reform" and the liability insurance industry's propaganda team whose flagrantly distorted half-truth horror stories and concocted "hocus-pocus" statistics form the basis of the products liability reform hoax. On examination by Senator Hollings, Assistant Attorney General Willard, who "headed-up" the "working group", admitted that his statistics came from Jury Verdict Research, whose figures were "gathered from people who write in" and from "newspaper clippings". See Transcript of May 20, 1986, hearing, page . He also claimed his figures were based on the Rand study, but their figures do not support his "hocus-pocus" statistics, either. See Footnote 28 on page 13 of my prepared Testimony for the May 20, 1986, hearing.

[92] A collection of cases from various courts-of-record throughout the United States.

[93] Section 8[a], 35 ALR4th 464-468.

[94] A quote from Senator Kasten, Congressional Record, supra, Note 62, S-5107.

[95] 30 of 39 cases (77%) were for less than $25,000; 25 (64%) were less than $10,000; 17 (43%) were less than $5,000; and 5 (13%) were less than $1,000.

[96] *Myer* v. *Fronimades*, 2 Wis.2d 89, 86 N.W.2d 25 (1957), punitive damages of $2,160 held excessive; *Jones* v. *Fisher*, 42 Wis.2d 209, 166 N.W.2d 175 (1965), $5,000 punitive damages award reduced to $1,000; and *Meke* v. *Nickol*, 56 Wis.2d 654, 203 N.W.2d 129 (1973), $47,000 punitive damages award reversed and remanded for new trial.

[97] Punitive damages awards considered excessive by Missouri appellate courts included awards ranging between $500 and $10,000.

[98] This annotation reviews 73 verdicts from 13 states which were reduced or reversed by the court as excessive. Only 1 of these 73 cases [*Stambaugh* v. *International Harvester Co.*, 106 Ill.App.3d 1, 435 N.E.2d 729 (1982)] involved a jury verdict in excess of $1 million. In *Stambaugh*, a $7.5 million verdict was reduced to $650,000. 72 (98%) of the 73 verdicts were for less than $500,000; 53 (73%) were for less than $100,000; 44 (60%) were for less than $50,000; and 35 (48%) were for less than $25,000.

[99] This annotation discusses 26 verdicts from 11 states which were reversed or reduced by the court as excessive. Only 5 (19%) were in excess of $100,000. Of the more than 275 appealed cases summarized in this annotation, only 3 involved jury verdicts in excess of $1 million and none of these 3 were in products cases (all three involved motor vehicle accidents).

[100] This annotation summarizes reported cases from 16 states where verdicts were reduced or reversed by the court as excessive. Typical cases include the following: $7.5 million verdict reduced to $650,000, *Stambaugh* v. *International Harvester Co.*, 106 Ill.App.3d 1, 435 N.E.2d 729 (1982); $2 million verdict reduced to $750,000, *Sewar* v. *Gagliardi Brothers*, 418 N.Y.S.2d 704

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5. As to damage awards for injuries to back, neck or spine, 15 ALR4th 294 (1982).[101]

6. As to damage awards for injuries to the respiratory system, 15 ALR4th 519 (1982).[102]

7. As to damage awards for injuries to the head or brain, 14 ALR4th 328 (1982).[103]

8. As to damage awards for injuries to circulatory, digestive and glandular systems, 14 ALR4th 539 (1982)

9. As to damage awards for injuries to sexual organs, 13 ALR4th 183 (1982).

10. As to damage awards for injuries to legs and feet, 13 ALR4th 212 (1982).

11. As to damage awards for injuries to arms and hands, 12 ALR4th 96 (1982).

12. As to damage awards for injuries or death of retired persons, 52 ALR3d 1289 (1973).[104]

13. As to damage awards for personal injuries or death of a minor, 49 ALR3d 934 (1973).[105]

14. As to damage awards for injuries or death of persons engaged in manual occupations, 47 ALR3d 909 (1973).[106]

15. As to damage awards for injury or death of women engaged in homemaking, 47 ALR3d 971 (1972).[107]

16. As to damage awards for injuries resulting in injury or death of persons engaged in professional occupations, 46 ALR3d 680 (1972).[108]

(1979); $1.38 million verdict reduced to $690,000, *Gorsalitz* v. *Olin Mathieson Chemical Corp.*, 429 F.2d 1033 (5th Cir. 1970); $750,000 verdict reduced to $400,000, *Macgrieter* v. *New Hotel*, 640 F.2d 508 (5th Cir. 1981); $650,000 verdict reduced to $375,000, *Cooksey* v. *Central Louisiana Electric Co.*, 279 So.2d 242 (La.App. 1983); $530,000 verdict reduced to $292,000, *Cassold* v. *St. Louis S.F.R. Co.*, 600 F.2d 35 (6th Cir. 1979); $480,000 verdict reduced to $280,000, *Morris* v. *Israel Brothers, Inc.*, 510 S.W.2d 437 (Mo. 1974); $304,000 verdict reduced to $104,000 *Phillips Pipeline* v. *Razo*, 409 S.W.2d 565 (Tex.Civ.App. 1966).

[101] Typical cases include *Monette* v. *Kilgore*, 370 So.2d 728 (La.App. 1979) [$400,000 verdict reduced to $85,000]; *O'Gee* v. *Dobbs Houses, Inc.*, 570 F.2d 1084 (2nd Cir. 1978) [$170,000 verdict reduced to $85,000]; *Carollo* v. *Wilson*, 353 So.2d 249 (La. 1977) [$500,000 verdict reduced to $80,000]; *Hardeman* v. *Mendon Leasing Corp.*, 450 N.Y.S.2d 808 (1982) [$425,000 verdict reducted to $275,000]; *Precopio* v. *Detroit Dept. of Transportation*, 415 Mich. 457, 330 N.W.2d 802 (1982) [$375,000 verdict reduced to $132,000]; *Johnson* v. *Great Atlantic & Pacific Tea Co.*, 459 N.Y.S.2ed 871 (1983) [$400,000 verdict reduced to $100,000].

[102] Typical cases include *Valence* v. *State*, 280 So.2d 651 (La.App. 1973) [$75,000 verdict reduced to $25,000].

[103] This extensive annotation covers 234 pages in the text and supplement and discusses cases from 48 of the 50 states. As the annotation discusses cases involving injuries to the head or brain, it covers many of the most serious damage cases. Included are the following cases in which the court made substantial reductions to the jury's verdict: *Naylor* v. *Louisiana Dept. of Public Highways*, 423 So.2d 674 (La.App. 1982) [$4 million verdict reduced to $2.3 million]; *Sequoia Mfg. Co.* v. *Haleck Constr. Co.*, 117 Ariz. 11, 570 P.2d 782 (Ariz.App. 1977) [$3.8 million verdict reduced to $2.8 million]; *Caprara* v. *Chrysler Corp.*, 423 N.Y.S.2d 694 (1979) [$3.6 million verdict reduced to $2 million]; *Sewar* v. *Gagliardi Brothers*, 418 N.Y.S.2d 704 (1979) [$2 millin verdict reduced to $750,000]; *Passantino* v. *Board of Education*, 383 N.Y.S.2d 639 (1976) [$1.8 million verdict reduced to $1 million]; *Drayton* v. *Jiffee Chemical Corp.*, 591 F.2d 352 (6th Cir. 1978) [$1.6 million verdict reduced to $665,000]; *Carollo* v. *Wilson*, 353 So.2d 249 (La. 1977) [$1 million verdict reduced to $600,000]; *Bassett Furniture Industries* v. *McReynolds*, 216 Va. 897, 224 S.E.2d 323 (1976) [$1 million verdict reduced to $550,000].

[104] Typical among the cases in this annotation are *Fowler* v. *Western Union Telephone Co.*, 357 So.2d 1305 (La.App. 1978) [$500,000 verdict reduced to $200,000] and *St. Louis S.R.C.* v. *Farrell*, 242 Ark. 757, 416 S.W.2d 334 (1967) [$70,000 verdict reduced to $50,000].

[105] Among the many cases discussed in this annotation are the following: *Riviera* v. *Monticello Central School District*, 377 N.Y.S.2d 822 [$600,000 verdict in the death of a 5-year-old child reduced to $40,000]; *Amerman* v. *Lizza & Sons*, 358 N.Y.S.2d 220 [$125,000 verdict in the death of a 4-year-old boy reduced to $23,500 by the trial court, but increased on appeal to $35,000]; *Landreth* v. *Reed*, 570 S.W.2d 486 (Tex.Civ.App. 1978) [$80,000 verdict in the death of a 14-month-old girl reduced to $35,000]; *Dolata* v. *Ohio Edison Co.*, 2 Ohio App.3d 293, 441 N.E.2d 837 [$52,000 verdict in the electrocution death of a 10-year-old boy reduced to $20,000].

[106] Among the more recent cases discussed in this annotation are *Migus* v. *Nicolet Industries, Inc.*, 493 F.Supp. 61 (E.D. Tex. 1980) [$3 million asbestos verdict reduced to $1.5 million]; *Walden* v. *U.S. Steel Corp.*, 567 F.Supp. 1443 (N.D.Ala. 1983) [$2 million verdict in the death of a coal miner reduced to $1.25 million].

[107] Among the cases discussed in this annotation are *Zaninovich* v. *American Airlines, Inc.*, 271 N.Y.S.2d 866 (1966) [$200,000 verdict in the death of a 28-year-old housewife reduced to $125,000]; *New Orleans and N.R. Co.* v. *Thornton*, 290 So.2d 547 (Miss. 1966) [$150,000 verdict in the death of a 44-year-old housewife reduced to $115,000]; *Rodriguez* v. *Trabitz*, 304 So.2d 396 (La.App.) [$130,000 verdict in the death of a 45-year-old mother of three reduced to $75,000].

[108] Typical of the more recent cases in this annotation are *Dover Corp.* v. *Perez*, 587 S.W.2d 761 (Tex.Civ.App. 1979) [$940,000 verdict in the death of a 28-year-old school district employee

Continued

17. As to damage awards for persons engaged in farming, 46 ALR3d 733 (1972). [109]
18. As to damage awards for injuries to trunk or torso, 12 ALR3d 117 (1967).
19. As to damage awards for injuries to organic systems 12 ALR3d 475 (1967).
20. As to damage awards for injuries to arms, legs, feet and hands, 11 ALR3d 9 (1967).
21. As to damage awards for injuries to head and neck, 11 ALR3d 370 (1967).

The cases collected in these 21 annotations clearly show that in state and federal courts throughout the United States, trial judges have exercised their discretion to reduce jury verdicts whenever they are excessive. In those rare cases where there are large jury verdicts, they are always carefully reviewed by the trial judge. Having viewed the evidence in the case personally, the trial judge is in the best position to determine this issue. This is an example of that "wise distribution of power" between judge and jury referred to by Lord Coke. It is a far better method than setting arbitrary caps on catastrophic injuries as the liability insurance industry would have us do.

CONCLUSION

Attached on the following pages are two recent news stories from the *Greenville News*. One is entitled, "Insurance Industry Caused Its Own Trouble", and the other is entitled, "Industry Blackmail Forces State Reversal of Insurance Reform". The first covers a report done for the National Association of State Attorneys General and a study recently released by the Consumer Federation of America. The Consumer Federation report concludes that "while the average product liability award increased by 150 percent between 1975 and 1984, . . . virtually all of it is accounted for by economic factors rather than a growing willingness of juries to increase awards." The second covers the insurance industry's "blackmail" of the West Virginia Legislature in retaliation for their requirement that the insurance industry provide accurate information on their profits and losses.

All valid statistics show that there is no products liability crisis. Before taking further action, this Committee has an obligation to the American people to get reliable and accurate information, both on the current situation, and on the undesirable side effects of sweeping legislative changes. If not, history may record that the 1986 Senate Commerce Committee was buffaloed into buying the biggest pig in a poke in recent history.

Respectfully submitted,

J. KENDALL FEW.

Senator KASTEN. Our next witness on this panel is Ms. Deborah Chalfie who is the legislative director for HALT, an Organization of Americans for Legal Reform.

Ms. Chalfie.

Ms. CHALFIE. Mr. Chairman, Senator Hollings, thank you for again affording HALT the opportunity to testify today on the latest product liability proposals. As you know, HALT is a national nonpartisan consumer advocacy organization with more than 130,000 active members nationwide.

Through its educational and advocacy efforts, HALT seeks to enable individuals to dispose of their legal affairs simply, affordably, and equitably. HALT testfied before this subcommittee last June and again last February about why consumers of the legal system believe that reform is necessary.

From the consumer's perspective, the current tort system is plagued with delays, unduly expensive, and extremely inefficient. Most important, the tort system is inequitable. We need the kind of

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reduced to $590,000]; *Meehan* v. *Central Railway Co.*, 181 F.Supp. 594 (D.N.Y. 1960) [$315,000 verdict in the death of a 39-year-old lawyer reduced to $235,000]; *Robinson* v. *Albany*, 218 N.Y.S.2d 421 (1961) [$125,000 verdict in the death of a 26-year-old police officer reduced to $65,000]. It is also interesting to note that in 29 cases involving businessmen and executives [§ 6], there was no jury verdict reported in excess of $1 million.

[109] The largest reported verdict for the wrongful death of a farmer in this annotation was $250,000. *Blanchard* v. *Rodrique, 340 So.2d 1001 (La.App. 1976).*

tort reform that delivers compensation more quickly, affordably, and equitably to people injured by products.

The proposals of the administration's tort policy working group, the Willard proposals, do nothing to remedy the delays, inequities and inefficiencies of the present system. They make it tougher for injured victims to get compensated, first by heightening the legal standards of liability and then by limiting the amount the victim can recover. Instead of removing hurdles to recovery, the Willard proposals simply erect more.

A resurrection of S. 100, we believe, is not the right approach. As HALT has emphasized all along, what is needed is an alternative compensation system. Because the administration's proposals lack this element, we strongly oppose such proposals as unresponsive and unfair to consumers. If an already unfair system is to be made more unfair in the name of the insurance crisis, consumers should get something in return.

We commend Senator Danforth and the committee staff on the newest draft. We have studied the new draft closely. We have looked at what both sides get and what both sides give up. With a few clarifications and additions, HALT believes it can now finally lend its wholehearted support to a product liability reform bill.

The new Danforth proposal, cosponsored by Senator Dodd, represents a creative, evenhanded, and workable solution to everyone's problems. For consumer groups like HALT who are concerned about compensating consumers and maintaining incentives for product safety, Senate amendment 1951 creates a simple, speedy, and equitable compensation system, yet leaves enough of a residual tort system intact to deter real misconduct. For those who want to discourage litigation, increase predictability and pay out less in damages, the bill increases the incentives on both sides to settle for more limited damages.

In addition to simplifying title II, we particularly like two improvements made in Senate amendment 1951. First, the requirement that arbitrators are restricted to selecting one party's figure and cannot split the difference will have the effect of making both parties be reasonable in their requests and their offers. Second, both parties are given more choices at more stages of the process.

Although our suggestions for improvement are few, we believe that the addition of our suggestions is vital to the workability of the Danforth legislation:

First, attorney disclosures about choices and rights under the legislation which were contained in prior drafts are crucial and should be reinserted. Most consumers are already aware that they can file a product liability lawsuit. They will not know that there is an alternative claims system. Consumers cannot make an informed choice about which system to use unless they are fully aware of the title II option. Because an attorney is likely to be the consumer's first point of contact regarding compensation rights, it is imperative that attorneys be required to make certain disclosures to the potential claimant.

HALT's second suggestion relates to a problem that may have been simply overlooked. As the current draft stands, net economic loss includes reasonable attorneys' fees calculated at an hourly rate. This is fine if the attorney charges an hourly rate.

But the bill also permits attorneys to charge on a contingent basis. It is not clear whether "contingent" means just "conditional upon winning" or whether it means percentage fees are permitted. Hourly rates, especially for a title II claim, are likely to be far less in amount than a percentage fee. Thus, if the attorney charges a contingent percentage fee, but the manufacturer only pays an hourly fee, claimants may find themselves having to make up the difference between the lawyer's fee and the manufacturer's contribution toward that fee out of their compensatory award. This means that some claimants will not really be made whole.

Our testimony includes suggestions for how to alleviate these and other problems. We also have some reactions and ideas concerning comments made by various witnesses today which we would like to submit to the committee after the hearing.

In conclusion, HALT believes that Senate Amendment 1951 is a fair, well-constructed compromise between the needs of consumers on the one hand and the needs of manufacturers and insurers on the other.

Thank you for inviting HALT to testify, and I would be happy to answer any questions you might have.

[The statement follows:]

STATEMENT OF AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM

Mr. Chairman and members of the Subcommittee, thank you for again affording HALT the opportunity to testify today on the latest product liability proposals. I am Deborah Chalfie, Legislative Director of HALT—An Organization of Americans for Legal Reform. As you know, HALT is a national, nonpartisan, consumer advocacy organization with more than 130,000 active members nationwide. Through its educational and advocacy efforts, HALT seeks to enable individuals to dispose of their legal affairs simply, affordably, and equitably.

HALT testified before this subcommittee last June and again last February about why consumers of the legal system believe that reform is necessary. From the consumer's perspective, the current tort system is plagued with delays, unduly expensive, and extremely inefficient. Most important, the tort system is inequitable—many deserving victims go uncompensated and, for those that do recover something, payment is grossly misallocated.

We understand that this subcommittee is concerned about the "insurance crisis." HALT also cares about this crisis. To the extent that product manufacturers can't obtain or can't afford liability insurance, people injured by their products will not be able to recover for their injuries. But plentiful and affordable insurance will not necessarily make it easier for deserving victims to recover quickly and fairly. Insurance crisis or not, we need reform because the tort system doesn't work for consumers.

From the consumer's perspective, we need the kind of tort reform that addresses those criticisms—the kind of tort reform that delivers compensation more quickly, affordably, and equitably to people injured by producers. With all due respect to Sen. Kasten, the Administration's proposals utterly fail on this count.

The proposals of the Administration's Tort Policy Working Group (the Willard proposals) do nothing to remedy the delays, inequities or inefficiencies of the present system. They make it tougher for injured victims to get compensated, first by heightening the legal standards of liability, and then, by limiting the amount a victim can recover. Instead of removing hurdles to recovery, the Willard proposals simply erect more.

Moreover, heightening legal standards and capping awards will not necessarily resolve the "insurance crisis," at least in the short-run. The insurance industry itself has acknowledged that its past practice of incurring underwriting losses in order to attract investment dollars during times of high interest rates has contributed to the current crisis. Because of this, many insurance companies are now stating publicly that, for various reasons, they cannot promise any immediate benefits in exchange for the award caps being enacted by some states. Some critics say that stronger regulation of insurance companies is necessary; others claim that more predictability is

the key to easing the crisis. But even if more predictability is important, it is possible to introduce more predictability without totally sacrificing the goal of just compensation.

A resurrection of S. 100 is not the right approach. As HALT has emphasized all along, what is needed is an alternative compensation system that is capable of delivering compensation to injured victims more quickly, simply, fairly, and efficiently than the tort system. Because the Administration's proposals lack this element, we strongly oppose such proposals as unresponsive and unfair to consumers. If an already unfair system is to be made more unfair in the name of the "insurance crisis," consumers must get something in return.

We supported S. 1999 in concept, but testified that fine-tuning was needed so as not to turn the alternative system into a mini-tort system. That fine-tuning has now been accomplished in S. Am. 1951. We commend Sen. Danforth and the Committee staff on the newest draft. It obviously reflects careful concern for and attention to the problems of previous bills. We have studied the new draft closely. We have looked what both sides get and what both give up. With a few clarifications and additions, HALT believes it can now finally lend its wholehearted support to a product liability reform bill.

The new Danforth proposal, cosponsored by Sen. Dodd, represents a creative, even-handed, and workable solution to everyone's problems. For consumer groups, like HALT, who are concerned about compensating consumers *and* maintaining incentives for product safety, S. Am. 1951 creates a simple, speedy, and equitable compensation system, yet leaves enough of a residual tort system intact to deter real misconduct. For those who want to discourage litigation, increase predictability, and pay out less in damages, the bill increases the incentives on both parties to settle for more limited damages.

In particular, manufacturers acquire the power to limit their liability; regardless of the system chosen by the claimant, the manufacturer can choose to limit the amount of its liability for noneconomic damages by offering to make the claimant whole. The bill also makes collateral sources of compensation primary regardless of which system is used, eliminates joint and several liability for the damages manufacturers complain most about (noneconomic damages), imposes stronger restrictions on the award of punitive damages, and creates a higher standard of liability for recovery against product sellers.

In exchange for giving up rights to joint and several liability for unlimited "dignitary" and punitive damages, consumers receive a truly simple, expedited claims process capable of making them whole in a relatively short time period. Moreover, because a claimant can always reject an offer of settlement and proceed with a lawsuit, deterrence for wrongful conduct is retained.

In addition to simplifying Title II, we particularly like two improvements made in S. Am. 1951. First, the requirement that arbitrators are restricted to selecting one party's figure and cannot "split the difference" will have the effect of making both parties be reasonable in their requests and offers. Second, both parties are given more choices at more stages. The claimant makes the initial choice of forum. Regardless of that choice, the manufacturer can basically "switch systems" by either denying liability under Title II or tendering a "make whole" offer under Title III. If Title II liability is denied, the claimant can choose to file a lawsuit; if a section 302 offer is made, the claimant can reject the settlement offer, but only at a price.

It appears to HALT that Sen. Danforth's new subsititute meets the criteria Prof. Jeffrey O'Connell and others have been urging. It makes it easier for injured victims to be compensated. And because manufacturers retain the right to deny liability and force the claimant into court, no huge "new claims frequency" is threatened. If predictability is the key to resolving the "insurance crisis," the dual system created by this legislation provides enough predictability to resolve the crisis over the long run, without wholly sacrificing the rights of consumers.

Although our suggestions for improvement are few, we believe that the addition of our suggestions is vital to the workability of the legislation.

First, attorney disclosures, about choices and rights under the legislation, which were contained in prior drafts, are crucial and should be reinserted. Most consumers are already aware that they can file a product liability lawsuit; they will *not* know that an alternative claims procedure exists. Consumers cannot make an informed choice about which system to use unless they are fully aware of the Title II option. Because an attorney is likely to be the consumer's first point of contact regarding compensation rights, it is imperative that attorneys be required to make certain disclosures to the potential claimant.

Attorneys should be required to make written disclosures about the process for receiving compensation under the two choices—including the applicable time peri-

ods for "make whole" offers, the role of arbitration, the kinds of damages available, and the consequences of the parties' decisions. Consumer groups and other interested agencies could easily assist the trial bar in meeting this requirement by producing simple, plain language brochures describing the two systems.

In addition, the experience of legal consumers suggests that written disclosures about the attorney-client relationship would greatly facilitate the choice process and help avoid misunderstandings. In order to make a fully-informed choice, the attorney should be required to provide the client with, for example, a written statement of the attorney's own fee arrangements (including hourly fee), an estimate of the potential expenses that the client would be responsible for, and the attorney's estimate of the time required, before accepting the case.

HALT's second suggestion relates to a problem that may have been simply overlooked. As the current draft stands, "net economic loss" includes reasonable attorneys fees calculated at an hourly rate. This is fine, if the attorney charges an hourly rate. But the bill also permits attorneys to charge on a "contingent" basis. It is not clear whether "contingent" simply means "conditional upon winning" or whether percentage fees are permitted.

Hourly rates, especially for a Title II claim, are likely to be far less in amount than a percentage fee. Thus, if the attorney charges a contingent percentage fee, but the manufacturer only pays an hourly fee, claimants may find themselves having to make up the difference between the lawyer's fee and the manufacturer's contribution toward that fee out of their compensatory award. This means that some claimants will not really be "made whole."

This problem can be alleviated in a few ways. First, "contingent" could be defined to disallow percentage fees and to only allow "conditional" hourly fee arrangements. Second, if percentage fees were permitted, they could be restricted to cases that went through "litigation" (i.e., cases where Title II damages were not awarded or offered). A third solution might be to exclude economic losses from computation of the "award" on which the attorney may base a percentage contingency fee. Any of these changes would assure that the claimant is not forced to pay their attorney out of their economic damages.

Finally, HALT has a concern about only allowing "attorneys" to be compensated for time spent in pursuing a claim. The Title II process has been greatly simplified in the latest draft. This means that, once informed about the choices, many individuals may choose to proceed under Title II *pro se* or to have a knowledgeable layperson (e.g., a paralegal or union representative) assist them in filing their claims. The assistant's or claimant's time, like the attorney's, should also be compensated as part of net economic loss.

In conclusion, HALT believes that S. Am. 1951 is a fair, well-constructed compromise between the needs of consumers on one hand and the needs of manufacturers and insurers on the other. As such, it is the appropriate vehicle for federal product liability reform. HALT applauds the new Danforth proposal and, as always, stands ready to assist the subcommittee in making the changes we have suggested. Thank you for inviting HALT to testify on this pro-consumer legislation. I would be happy to answer any questions you may have.

Senator KASTEN. Thank you very much. We look forward to working with you.

The next witness on this panel is Mr. Hugh Reynolds, president of the Federation of Insurance and Corporate Counsel. Speak directly into the microphone.

Mr. REYNOLDS. Thank you, Mr. Chairman, and Senator Hollings.

Like Mr. Few, I am a trial lawyer. I have tried cases for 30 years primarily on the defense side. That is the perspective that I bring to this hearing. I think not enough has been said about the fact that the jury system is a good system that has served this country very well in civil as well as criminal litigation.

What I feel that what the juries need, particularly in the product field, is more help in getting standards and realistic instructions that enable them to separate the wheat from the chaff and to come out with something that is a reasonable result and a reasonable balance.

In my judgment as I see what happens in the cases I try and the other cases in my area, there is indeed a problem with the tort system that calls for reform. The question about the reform on products liability that is raised by the judge is a very good one. That is, that in many cases you have multiple parties, some of whom are manufacturers and some of whom are not, I think this is a problem that has to be addressed. But nonetheless, when you are talking about the standard to which each defendant must respond, it seems to me that products liability with a Federal standard is a reasonable point of view.

One of the reasons for this is that the responsibility of the manufacturer arises essentially in the acts or omissions that occur at the time a product is made. It is important for a manufacture when making a proper judgment concerning proper conduct to have reasonable standards to work to at that time. In most but not all negligence actions, including those types of actions that are intermixed with products cases, the fault or lack of fault arises many times from instantaneous decisions made in the short space of time in the environment in which the actual injury occurs.

Sir, I do think that while the problem is a serious problem, addressing it by Federal tort reform in products liability is appropriate. It is also appropriate because it is important that manufacturers have a standard that is relatively uniform to be applied throughout all the United States because that is where their products are being distributed.

I also might add as a practical matter it may tend to discourage forum shopping, which is a very definite problem in this field. In my judgment, the most important area that needs to be looked to is the drafting of standards that try to minimize the use of hindsight in judging the conduct of manufacturers or distributors of products.

I believe that the adoption of strict liability in the case of fabrication problems is a very appropriate rule. I believe, however, that as it works, whether it works directly or indirectly, that in design cases and in cases with labeling and warning, the standard should be a negligence standard not strict liability.

We, thus, in effect have two standards, actual fault as you and I would understand it, and legal fault. The legal fault being that of a manufacturer of a product which, although made with all reasonable care, is in fact defective so as to be unreasonably dangerous. In my judgment, it is important to combine those in a law of comparative fault in which the comparative fault of all the actors in the drama is assessed and the manufacturer's responsibility is limited to that degree of fault to which he has contributed to the plaintiff's injury.

I address that subject in much more detail in my statement, which I trust you will incorporate into the record. I don't believe time permits going into this. It seems to me a necessary corollary that if you have comparative fault, which is by far the most appropriate standard under the system as we know it, the system of joint and several liability is simply inappropriate and, indeed, most unfair in many instances of its operation.

The collateral source rule is a lot more difficult. I address a lot of the considerations in detail in my paper. But it seems to me that to permit a double recovery to the plaintiff, making allowance for cer-

tain specific public interest factors that have to be considered, is inappropriate and not in the general public interest.

Now how the product liability works in the courtroom is the area where I think I can say the most. But I think I would prefer to respond to specific questions on that evaluation. But what I see is that you have a serious problem for the deep-pocket defendant, often the manufacturer; you have a serious problem of the commencement of nonmeritorious lawsuits in which there are very little disincentives to commence them. I think some of the provisions of the pending bills provide appropriate disincentives, but we must never have a disincentive to bring a lawsuit by a seriously injured plaintiff who is entitled to recovery.

One of the things that is addressed in only one of the bills is the problem of a time limitation. It seems to me even though there will be cases, as indeed there are cases in imposing statutes of limitations where a worthy plaintiff does not recover that, on balance, it is in the public interest to have a reasonable statute of repose.

Obviously reasonable minds can differ as to what the length of that statute would be. But I would suggest that 25 years is far too long.

Personally, I am not in favor of caps on noneconomic damages, even though I'm on the defense side of the case. If the plaintiff has sustained a real damage, and in my opinion pain and suffering is a real damage, it seems to me that we can trust the jury, particularly if the other reforms that are addressed are made to put a balance back into the system to properly meet the problem of noneconomic damages.

However, where you have cases of liability without fault, it is not inappropriate to have a tradeoff that, in return for exposing a defendant to liability without fault, the plaintiff gives up not a cap, but all noneconomic damages. Now that is not structured into either bill. I am just giving you my personal opinion.

Caps on punitive damages, however, in my opinion are immanently appropriate. They offer punishment. It is a fundamental principle of punishment in this country, you do not set a fine on an individual who violates a criminal law by saying we will tell you what the fine is after we have found you guilty. That is what you have here. I think there are many other problems with punitive damages. But I would not advocate eliminating the use of punitive damages in those egregious cases, and the Pinto case is a perfect example where a manufacturer needs to be punished.

But it still seems to me—you can argue of course that Ford Motor Co. has a lot of money and so forth—but it still seems to me a matter of fundamental fairness, there should be a cap.

I think that, in the long run, many of these reforms would be to the plaintiffs' advantage. I would be happy to answer any questions.

Thank you very much.

[The statement follows:]

STATEMENT OF HUGH E. REYNOLDS, JR., PRESIDENT, FEDERATION OF INSURANCE AND CORPORATE COUNSEL

Mr. Chairman, members of the committee I am Hugh E. Reynolds, Jr. I am president of the Federation of Insurance and Corporate Counsel. This organization is

composed of about 1300 attorneys who defend civil claims for insured and uninsured parties in litigation. A small percentage of our members are company claims attorneys with business, commercial, manufacturing and insurance companies. I have been asked to speak for this organization. By way of background, I am also on the Steering Committee for Litigation Cost Containment, the Governing Committee of the Forum for the Construction Industry of the ABA, the Board of Directors of the Defense Research Committee and a Fellow of the American College of Trial Lawyers. I do not purport to speak for those organizations.

I was admitted to the bar in Indiana in 1953. I served with the Judge Advocate General's Corps, United States Army, for 3 years. Since then I have practiced continuously as a litigator with my present firm. I have specialized in products liability cases, construction litigation (which more often than not includes a product liability component in the dispute) and surety disputes. The nature of my practice is such that I generally represent defendants in cases involving personal injury, property damage or, occasionally, commercial loss. I have had a fairly extensive practice as plaintiff's attorney in product laibility claims in serious property damage cases and, rarely, in personal injury cases.

In much litigation in which there is a claim of product defect, cross-claims, counterclaims and third-party claims abound. Thus, one on the defense side of a multiparty product case often acts as a plantiff's lawyer as to a certain aspect of the case. In my opinion, the operation of the product liability tort system at this time needs reform. That system's impact on the commercial and industrial participants in litigation is unfairly damaging to a degree that is substantial to all and crippling to some. A simplistic view of the system in the context of the innocent badly injured plaintiff on the one side and a large manufacturer of shoddy products on the other is not only patently wrong, it leads to radically inaccurate assessment of statistics, a warped view of the import of its procedures and masks the undesirable consequences of certain especially pernicious aspects of the system.

We are considering whether some of the proposed reforms of the law of product liability are essential to correct a substantial lack of balance between providing appropriate compensation for persons who have sustained physical injury or property damage as the result of the use of products which are dangerously defective and yet creating a realistic, economically sensible and forward looking environment for persons and organizations participating in the manufacture and supply of products. It is manifestly desirable that such participants have some reasonable assurance that if they conduct their affairs in a responsible fashion, looking to provide the public with newer, better and more innovative products, they are more likely to be rewarded than penalized. Such participants also must have some reasonable assurance that they will be fairly treated when faced with claims by persons or organizations claiming personal injury, serious property damage or death. As a corollary to this, such participants must have reasonable assurance that the law will provide disincentives for the assertion of frivilous or questionable claims. Ideally, the law should provide some protection against excessive costs of defense when a claim is asserted where reasonable minds might differ concerning its merit and yet such defense costs under the present system are disproportionately high to the amount in issue.

The final essential component to consider in adjusting the balance is a common sense approach to the public interest in providing justice to those who are tortiously injured through the use of defective products and an equal degree of justice to those who choose to enter the field of manufacturing. Manufacturers should be able to attempt to develop and market their wares for the benefit of the general public and their own profit in a legal environment that is stable, predictable and even handed. The lack of such an environment discourages companies from the development of new technology and new products. Such a lack also discourages the commitment of time, ideas and capital by individuals to the development and sale of new and improved products. In a stable, predictable and even-handed legal environment the prudent and the responsible are more likely to be rewarded and the imprudent and irresponsible are more likely to be duly punished.

Unfortunately, the operation of the present system of tort liability as I see it, provides a capricious allocation of awards to plaintiffs giving to some too much, to others too little, and to many, nothing at all at an exorbitant cost and with an unpredictable and, in many instances, unfairly crippling impact on the businesses which supply manufactured products to the marketplace.

It does not require a fundamental change in the civil justice system that has served the United States so well to correct these imbalances. Rather, a comparatively few modifications afford a very real prospect providing a fair balance among the competing requirements of injured victims, those in the manufacturing process and the public interest. It is my judgment, based upon what I see and experience, that

there is indeed an emergency. What I hear from others and what I read confirms the conclusions I have drawn from my own experience and the experiences I see in the area in which I practice.

The perspective that I believe I can contribute to this dialogue is that of a trial lawyer who has over 30 years experience in such cases. I have observed not only the development of product liability law and the practices and procedures used in its implementation, but also the practical results of those developments upon my various clients who have participated in this process both as plaintiffs or defendants (and sometimes, both at the same time). Many of the problems that I perceive in the present system that, in my judgment, must be addressed by legislation or judicial decision apply equally as well to serious property damage claims as they do to personal injury claims and both types of claims are contributors to the current emergency.

Now I have used the word "emergency" twice. One of the questions posed is whether there really is an "emergency". Often that question is framed solely in the context of what is described as the "liability insurance crisis." My perception is that the liability crisis is merely an extraordinarily serious phenomena impacting upon our commercial establishment which has caused attention to focus on problems with the civil justice system that have been in gestation and festering for a number of years.

The fact, if it is a fact, that the liability insurance crisis is contributed to, in part, by the insurance companies' mismanagement of their own business is, in my opinion, partly supportive of the proposition that serious reforms must be made in the legal compensation system in the United States rather than the reverse. One of the more substantial charges of mismanagement is that the insurance companies did not consider or foresee the substantial and dramatic changes in the product liability system and other claims exposures of their insureds when underwriting risks in a given time frame. Yet the payment of claims for the risks underwritten may extend over a period of years during which these fundamental and disadvantageous changes in the operation of the legal system have occurred.

One of the most serious problems with our present product liability system is that when manufacturers fabricate products and insurers underwrite the risks arising from such fabrication neither has any idea what changes in the law or technology will impact on their claims exposure years later.

This is not the sole contributing factor to the liability insurance crisis and the withdrawal of the London market from many commercial risks in the United States, but is certainly a major component of the problem. Furthermore, anyone who sees what is going on from my perspective, and still can suggest that the maloperation of the system in its present form is not contributing to the insurance crisis, probably would also conclude that judgment day is simply another rock music festival.

In any event, if a fair examination of the product liability system reveals that there are rules of law that should be changed and that they are both unfair and operate to the substantial disadvantage of commerce and industry in the United States, those changes should be made whether the insurance crisis is real or not.

In discussing these matters in my testimony I have relied not only on my own experience and that of members of my firm, but on information received through extensive attendance at functions of professional organizations whose members are active litigators or users of the system. I have read many of the available written sources of information concerning the system and how it operates. There is disagreement on many of the issues that I will address in this material. I have tried to select those positions that I regard as most credible and most accurately reflecting the conclusions I draw from my own experience.

During the 30 some years since 1953 a number of dramatic changes have occurred in the operation of the civil justice system in general and, to an even greater degree, in product liability litigation. This period of time has seen the development of a number of new legal doctrines and procedures. These developments have almost invariably provided additional relief for claimants for more types of alleged wrongs, provided rules of evidence and procedures which assist claimants against manufacturers to more readily present and establish their claims and provided statutory or judicial support for theories that greatly expand the amount of recovery.

We have structured a product liability law in most states under which a manufacturer is held legally responsible for injury caused by its product although guilty of no fault in the generally accepted sense of the term, and is required to fully indemnify an injured plaintiff, even one whose fault has contributed to a material degree to the injury. In many cases the manufacturer pays the bill (often a bill already paid by someone else) for injury caused largely by the incompetence, faulty mainte-

nance, shoddy workmanship or inattention of the injured victim's employer or fellow employees or of the user or maintainer of the product. In many other cases the product's contribution to the scenario of injury is tangential but the manufacturer is the only potential defendant with money. Both the Danforth Bill and the Kasten Bill address these problems from differing perspectives.

The doctrine permitting a party not in privity of contract to recover from personal injuries from the manufacturer for a product that is dangerously defective and made so by the negligence of the manufacturer is clearly an appropriate and laudable advancement of the last 30 years. I would note, however, that when faced now with specific reform proposals that may have the affect of reducing a plaintiff's potential for a verdict or reducing the amount of recovery, one hears from those who oppose such proposals loud screams of pain that the "rights" of the injured parties are being taken away from them. This is a patently false issue. The structuring of this or any field of law in a system like ours properly involves a balancing of interests. Any such balancing, if it results in change, takes from one and gives to another.

Often such changes, if legislative, are prospective and not retrospective. The fact is, however, that most such changes are by judicial fiat and, more often than not, are retrospective. And for the 30 some years that these legislative and judicial changes have taken place, almost universally to the benefit of injured parties, the people who now speak of vested "rights" as a basis resisting change, were the same people who lobbied so hard and so successfully in the legislatures and before the appellate courts of this land to secure the changes that have provided a system that puts us in the fix in which we now find ourselves.

Those earlier changes should have been and, in many cases, were carefully evaluated on their merits. There is no reason why the same standard of judgment should not operate as to present legislative proposals or matters pending before the judiciary. If these proposals, in effect, restrict plaintiffs in the manner or method of presentation of their claims or the compensation awarded this does not compel their rejection. If, on the merits, such revisions are required to restore fundamental fairness to the system and to support the public good so as to encourage a forward thrusting, innovative system of manufacture and distribution of products in this country, then what is done is "right."

Apart from the fundamental unfairness of the present system, and its unnecessary cost, a great harm is caused by the messages if often sends. Rather than sending a message to "make good products" far too often the message sent by the system is "play it safe," (not public safety, *my* safety) "don't innovate," "get out of the markets where the risks of litigation are high." If you do not follow these repressive messages, your business will be destroyed by the product liability system as it now exists. And, in some cases, perhaps far too many, that destruction has already occurred.

I have never heard complaints that the "rights" of the Buick Motor Company were stripped away when Judge Cardoza decided in *McPherson* v. *Buick* that Mr. McPherson had a right to recover from Buick when injured by its car even though there was no privity of contract. If the argument against tort reform is that by changing the system "rights" are being taken away were valid, one wonders how the many developments that have led us to the present state of affairs could or should have occurred. Most of these developments have been the result of judicial decisions rather than legislation. Consequently, the affect of these changes has more often been retrospective rather than prospective. And I doubt if anyone who is familiar with the law would seriously contest that the overwhelming bulk of such decisions in the last 30 years have been in favor of the claimants and against manufacturers, suppliers, designers, etc. This is not to say that those decisions have all been bad or even, indeed, that they have been bad for the most part.

However, one of the reasons for problems with the system which we now experience is the fact that during the process of balancing that should have occurred in the past judicial decisions, all of the balancing was done in favor of the claimant and little or none in favor of the manufacturer. Thus, all of the barnacles of the old outdated law that was being changed to create liability exposure to the manufacturers suitable to a modern sophisticated complicated world were, where they favored the claimant, brought along as a massive encumbrance. Many such rules are justified by neither logic nor experience. They tip the scales against a foreseeing improvement in product liability law to provide truly effective protection for the victims of defective products at reasonable cost into what has become a system that is unduly and unreasonably burdensome and expensive to manufacturers and innovators and, in its practical application, provides a compensation system that cries for reform.

Let us take for example the development of the law of comparative fault through judicial decision and statute. My distant memory suggest that upon my graduation fault law and from law school in 1953 the state of Wisconsin had a comparative in all other states of the Union contributory fault has a complete defense.

The thesis of contributory fault was that anyone who had been guilty of fault in contributing to his or her injury was unworthy of compensation from others equally or even more greatly at fault. In essence, an injured person's wrong-doing disqualified him from compensation. Not surprisingly, the proponents of a "modern" law of products liability argued that a plaintiff had contributed, let us say, only 5% of the faulty conduct to cause the injury and the defendants together had contributed the other 95%, it was unjust and unreasonable that the defendants should go aquit from the consequences of this fault. Thus, it was argued, a doctrine of comparative negligence was more appropriate. Personally, I agree with this logic, but only if we are consistant in its application wherever it is relevant. Unfortunately, under the able persuasive talents of the plaintiff's bar in legislatures and before appellate courts, the doctrine is applied consistently when its benefits the plaintiff, but the same fundamental thesis, when it benefits the defendant, is discarded. In many cases, an "archaic" law being changed by the adoption of the doctrine of comparative fault remains archaic in all other relevant respects which might fairly balance the plaintiff's advantages now achieved. The Kasten Bill provides a much needed balance on these issues.

The doctrine of joint and several liability, which is more appropriate to various contractural and business relationships, is still a part of the law of torts. It is difficult to see how this doctrine ever was applied in tort cases where the contribution of fault is the touchstone. The only argument I hear from plaintiff's lawyers is that if the doctrine isn't available, the plaintiff, "won't get all his money" if in fact several of the defendants are financially irresponsible. I do not understand it to be a function of a system of recovery based on fault that a person who is prudent enough to be financially responsible should cover the fault of others not in concert with him simply because they are financially irresponsible.

In a true fault system for which the plaintiff's bar argues so ably and so vociferiously a defendant should pay only in that proportion that his fault has contributed to the plaintiff's loss. However, efforts to abolish the doctrine of joint and several liability universally meets violent opposition from the plaintiff's bar and the so-called consumer protection groups. The doctrine of joint and several liability in negligence cases as it exists in far too many states is illogical and unfair. But in a system of exposure based on comparative fault, if joint and several liability still applies, it is not only illogical and unfair, its continued use should be unthinkable.

The text of the current Kasten Bill as I read it (Amendment No. 1814) provides an appropriate balancing of the doctrines of comparative fault and a substantial modification of the doctrine of joint and several liability (limiting its application to those who act in concert) to achieve a unified whole that is logical and provides a true fault system. Such a fault system, it is said, is supposed to send messages to be careful to all of the participants.

The sending of such a message to the participants in the system should apply as equally to negligent plaintiffs as it should to negligent defendants. This aspect of the "message giving" function of the tort system is too often overlooked.

The practical effect of the existence of the doctrine of joint and several liability in the court arena must be enormous. Let me address what I see. In many, many cases a plaintiff is injured as a result of various errors in the use of the product (including, in quite a large number of cases, errors committed by the plaintiff). The plaintiff's lawyer has a seriously injured plaintiff with a potential for a large recovery if he can get the case to a jury and collect. The resources of the true wrongdoers are either unobtainable because they cannot be sued or are limited and their collectibility is doubtful.

The non-manufacturer is subject to a negligence standard not "strict liability". Furthermore, human nature being what it is, none of us like to admit, even to ourselves, that we have been responsible for the serious physical injury or death of another human being. Thus, the excuses that we all make throughout life are present here. The brakes didn't work; the car suddenly swerved; I pushed the right botton but it didn't operate; the machine failed to function; I never saw that rock; the machine must have done something wrong; I followed all the instructions. The litany of those excuses is lengthy and, not surprisingly, omnipresent.

Furthermore, it is not a question of a witness deliberately lying. By the time of the trial, most people who have made those statements truly believe them to be true, even though the physical evidence demonstrates a very high degree of probability that their statements are inaccurate. In such cases, the statement of a per-

ceived malfunction of a piece of machinery, usually constitutes sufficient evidence to go to the jury (even if very weak) unless the statement is so preposterous that a trial judge concludes that no jury could possibly accept the statement. The appellate records are strewn with the bones of trial judges who have been so bold.

The plaintiff's attorney can then provide a witness from the available roster of highly paid experts available to both sides who can quite honestly testify that, if what the witness has said is true, the product indeed must have malfunctioned. Often, it is not possible to confirm or deny as a matter of law whether such a malfunction could have occured from examination of the product. This is particularly so in the substantial number of cases in which the product has been consumed, has been lost or destroyed since the accident, or has been badly damaged in the accident so as to leave one in the never, never land of what "might have been."

More often, such experts then second guess the designers to suggest that if it had been made in some other way, the perceived malfunction could not have happened. In either instance we have a case to go to a jury. In such cases, if in fact a jury concludes that the manufacturer is responsible, my experience tells me that for the most part, the juror believes that the degree of responsibility or contribution of the manufacturer is minimal at best. Furthermore, in many cases, as a tactical matter, the plaintiff and the other defendants excluding the manufacturer "gang up on" the manufacturer. Anyone who tries a lawsuit knows there is a tremendous advantage if a plaintiff can get the defendants to fight among themselves. There is an even greater advantage if the plaintiff and one or more judgment proof defendants can combine to go after a target defendant (often a manufacturer).

Many product cases arise out of industrial accidents where the persons or organizations whom you and I would readily agree are truly responsible for the injury, are immune from tort liability by reason of the operation of the system of workmen's compensation protecting the employer and fellow employees of the victim. Furthermore, in those states in which there is a workmen's compensation lien, the employer or his compensation carrier if he is not self-insured, have both an interest in recovery by subrogation of substantial sums of money spent in compensation payments and the financial wherewithal to finance product liability litigation (which is, in serious cases, very costly). If the comparative fault rule applies to employer's fault and combines with prorating the lien recovery, a fair balance is more likely to occur. This will also more fairly apportion the final cost of the plaintiff's injury where it should ultimately rest.

If the state of the law was that the manufacturer's exposure would be limited by his degree of contribution through fault to the plaintiff's injury (and by fault I will include both actual fault and legal fault) there would be a substantial change in the exposure of the manufacturers. Many, many of the very questionable cases against manufacturers would never be brought at all. Unfortunately, my experience confirms that in many instances, the manufacturer is sued not because the plaintiff's attorney has a firm belief that the manufacturer is responsible, but because the manufacturer is "the only game in town" if the plaintiff is going to realize any money. But broad discovery rules may provide a handle to require submission to the jury and, perhaps, the jackpot.

Considering the welfare of the people of the United States as a whole, which is the responsibility of this Congress, such a disincentive is much in the public interest. It makes no sense to encourage a plaintiff's counsel to commence an action which will cost a manufacturer from $50,000-$250,000 to defend it if the manufacturer is, at best, 5% responsible for injuries which cumulatively have a value of $500,000. The incentive under the present law provides a remedy that the manufacturer, although responsible for only 5%, should pay the entire $500,000 because those who are responsible for the remaining 95% don't have any money to pay the verdict.

Another doctrine of the law that applies to most tort damage cases but with particular impact in product liability cases, is the so called collateral source rule. Under the collateral source rule, the plaintiff may keep payments received or to be received in the future which will indemnify the plaintiff for the same injuries for which the plaintiff is seeking recovery against the product manufacturer. The argument for the rule is that, because he is a "wrongdoer," the manufacturer should not receive the "windfall" of a credit for these other resources which provide indemnity for injury. Some of these collateral source payments, in effect, amount to a double recovery to a plaintiff who is successful in the litigation. Others, notably workmen's compensation liens, often must be repaid.

The theory that somehow or another such a "wrongdoer" should not have the benefit of a windfall seems a very poor balance against the double recovery to be received by the plaintiff through the operation of the collateral source rule. Both

experience and intuition tell me that the abolition of the colleteral source rule for those benefits for which the plaintiff himself has not personally paid a premium (or it has been paid by a member of his immediate family) would substantially reduce the exposure to manufacturers in a number of cases and the only loss from the plaintiff's side is the loss of a double recovery. Another practical benefit of preventing double recovery for those coliateral source benefits is to make cases easier to settle.

The reasons for adoption of this reasonable modification of the collateral source rule are to avoid a double recovery that is fundamentally unjustified, to provide a disincentive for the commencement of litigation that is of doubtful merit in many cases where the potential recovery of net economic loss to the plaintiff would not justify commencement of litigation if the plaintiff is denied the opportunity to obtain a double recovery, and finally there is no reason why a plaintiff's injuries should impact to burden both the compensation, welfare and employee benefits expenses of the businesses of the United States and the manufacturing community as well. Yet this, in effect, is what we have in many instances.

Ten or fifteen years ago, the major damage components in personal injury cases were the loss of earnings or potential loss of earnings and pain and suffering. Although past and future medical expenses in serious cases were often quite substantial, they were generally smaller than the lost earnings or loss of services component. The pain and suffering aspect of cases was equally as difficult to predict twenty years ago as it is today, I believe pain and suffering was a larger component of the verdicts in the large cases then than is true today. Although this runs contrary to present conventional wisdom, it is my perception that in cases of serious permanent impairment, the pain and suffering and lost earnings component, have shrunk as a proportion of the whole and the past and future medical expense has gained substantially. It is in the area of the medical expenses in which modification of the collateral source rule is most likely to be effective.

One of the major problems to be addressed in structuring modification in the collateral source rule is what to do with those collateral sources that constitute liens. If the liens are enforced and paid, the plaintiff does not receive a "double recovery." In my experience, many such liens are not enforced and, in fact, the plaintiffs and their counsel often attempt, insofar as they can get away with it, to avoid such paying liens. The defendant often is unaware of the existence of the lien unless a specific notice is given. The lien holders often don't even know the suit is on file.

In many product cases, the workmen's compensation lien involves potential recovery by an employer who may have been a major contributor to the injury received by its workmen. The existence of such liens and the complications that they furnish are a serious problem in settlement of cases, particularly cases of doubtful liability. The rule set forth in Senator Danforth's bill which provides a trade-off on workmen's compensation liens by abolishing the lien, providing that the plaintiff cannot recover for compensation payments and requiring the manufacturer to give up rights of indemnity against the employer (since that bill contains something in the nature of a contribution among joint tortfeasors feature). Reasonable minds could differ over how to handle the problem of such liens, but it is my best judgment that abolishing the liens with trad-offs such as have been mentioned in the Danforth Bill, is probably the better way to go.

If the liens are confirmed, obviously they need to be prorated to the extent that the plaintiff's recovery may be reduced by the plaintiff's comparative fault. For example, if a plaintiff is 50% at fault and a defendant is 50% at fault, it seems reasonable that the lienholder should only recover 50% of the lien rather than have the entire amount of the lien come out of the plaintiff's verdict which represents only 50% of his actual loss. This, of course, assumes that the lien is recoverable even though it constitutes a collateral source. What I do feel very strongly is that the present system which allows a plaintiff to recover twice for non-lienable items is inappropriate where the benefits result simply from the plaintiff being a member of public or are benefits provided because of employment or membership in an organization.

The problem of private insurance benefits, particularly life insurance, poses a difficult emotional barrier in the collateral source equation. Logically, there is no reason why such a collateral source should not be a credit. The argument is that the plaintiff by his prudence has purchased the insurance that covers this loss. The fact is that in most types of insurance, the insurance is purchased for general hazards. The likelihood of serious bodily harm or death because one is injured through a dangerously defective product is a very small component of the risks for which the insurance is purchased. On balance, I believe the competing considerations support a

rule that medical benefits received as a result of private insurance should also be indemnity which the plaintiff cannot recover twice.

However, I think life insurance benefits are somewhat different. Life insurance is purchased only in part to protect against the risk of premature death. None of us has any reasonable expectation of living forever. Furthermore, the purchase of life insurance is part of the accumulation of the estate of the decedent and is based upon many collateral considerations of which the "risk" of premature death is only one. Perhaps my position is illogical, but I do not believe that life insurance payments resulting from private policies purchased either by the decedent or by a member of his immediate family should be considered in arriving at the plaintiff's net economic loss. It is not a double payment, it is money the estate will inevitably receive if the policies are maintained in force.

The collateral source evidence may be heard by the jury which considers that evidence in arriving at its verdict or, at a hearing before the judge after the verdict in which such reductions are applied as are appropriate under the law.

There is an advantage to the defense side from having the information go to the jury, particularly if the collateral source payments are substantial. In cases of doubtful liability where a person is seriously and dramatically injured, it is very difficult for a lay injury to resist the temptation to come in with a plaintiff's verdict. Usually there is a compromise on the amount of damages because the jury realizes the plaintiff isn't entitled to anything but the thought that a plaintiff may be exposed to a lifetime of inadequate medical care and penury swings the balance. In such cases, the jury is more likely to provide a verdict appropriate to the evidence on the issues of liability if it is aware of the collateral sources available to the plaintiff. Again, this is clearly a disincentive for commencement of frivolous cases or cases of questionable liability where a great bulk of the plaintiff's injuries are compensated for by collateral sources which the jury will hear.

Personally, I think it is more appropriate that we can trust the jury to arrive at a proper verdict if the other proposed reforms to bring the system into balance are adopted. The appropriate reductions for collateral sources should be made by the judge after the verdict has been rendered. Incidentally, it would be a matter of fundamental fairness, in my judgement, that the reduction for collateral sources be prorated. That is to say that if the award is that the plaintiff's injuries are in an amount of $100,000 and the collateral sources are $50,000 and the defendant manufacturer is 55% at fault, it seems to me that the reduction for collateral sources from that portion of the verdict owed by the manufacturer should be at 55% of the collateral source and not by the entire amount of the collateral source. My position on this is consistent with the similar position I have expressed with reference to the proration of liens in the event lienable payments are considered as part of plaintiff's net economic loss.

I have watched the development of the so-called strict or seller's liability rule within the last fifteen to twenty years. It was adopted first by judicial decision and then by statute in my own state of Indiana. Fault here is what I have called in earlier portions of my text a "legal fault." This means that the manufacturer is held legally responsible not because of negligence or fault in the generally accepted sense of the term, but because it has manufactured a product which is defective so as to be unreasonable dangerous. The rule applies not only to manufacturers, but basically to all of those in the chain of distribution of the product.

The concept of "legal fault" really has its application most properly to areas of defective fabrication, malassembly and physical defects in the manufactured product which, as made does not conform to the design. One of the serious difficulties in the practical application of strict liability in products cases arises out of the design and warning issues. In these cases, any submission to the jury that does not require showing a failure to use reasonable care based upon what the actor knew should have known at the time, provides for gross inequities in its application to manufacturers of products.

There are a variety of ways to approach this particular practical problem that arises so often in the courtroom. Again and again, those of us who engage in a trial practice in the area, find that in areas of labeling, warning and design, the practice of second guessing, based upon information acquired after the product has been manufactured and distributed, is often impossible to combat. Fortunately, many juries have the good sense to see the testimony of the plaintiff's experts and the assertions of the plaintiff's counsel for what they often are, the improper injection of hindsight. But the jury needs help from clear, uniform and common sense rules that do not apply today's knowledge to yesterday's decisions.

A particularly pernicious aspect of this is that in all issues of design, warning or labeling, there are trade-offs and balancing that must be made. The warning must

be the right length—it can't be too long, it can't be too short; will the order of the wording give the wrong message if you give too many warnings, will they be ignored (like the boy who cried "wolf"). In designs, if you make this part stronger, you also make it heavier. It is almost always easy after the facts are known concerning how the accident happened to suggest how some different design could have prevented the accident. With a seriously injured plaintiff in the courtroom it is not easy to persuade a jury to consider the balancing factors. They cannot always see that perhaps hundreds of other people might have been injured if the product had been designed or the warning structured or the labeling applied as the plaintiff's lawyer and his experts suggest which suggestion would, if adopted create other and more serious problems.

To a certain extent this basic problem exists in much of personal injury litigation. It cannot be avoided entirely. I have a great respect for the good sense of juries if they are given reasonably clear standards to follow. It doesn't mean they are always right, but then again, none of us is always right.

I feel it is vital to establish general standards of legal rights and responsibilities within or throughout the United States for manufacturers in connection with their exposure in design, warning and labeling. In these areas it is especially important that the manufacturer know the standard to which it must be working in advance. Such legislation is essential to avoid what is probably one of the greatest problems of a practical nature in the implementation of the tort liability system at this time. Defense of manufacturers in states where there is no specific workable state of the art or comparable legal doctrine is unfairly hampered because the jury is left in a quagmire of imprecise instructions and admonitions. These make it very difficult even for the most conscientious jury to separate the wheat from the chaff. More importantly, it makes an appropriate application of liability based on fault virtually impossible in the cases of allegedly defective design, labeling or warning.

When a serious injured plaintiff is added to this scenario the exposure of the manufacturer even under appropriate standards of law and proper instructions is subject to the operation of a very natural and very human prejudice. This is simply a component of any system that is to be administered by human beings. However, there is no reason to enhance the opportunity to substantially aggravate the problem by not having uniform minimum standards defining legal exposure applicable throughout the country to provide appropriate guidelines to minimize the application of hindsight to issues of design, warning and labeling.

In addition to a well drafted "state of the art" standard, if ones' labeling or warning or design has been structured in accordance with appropriate federal or state statutes, guidelines or specific approvals, this should, at a minimum, constitute a rebuttable presumption that the design, warning or labeling is not defective and non-negligent.

In product liability law, the spectre of punitive damages is, as presently applied, definitely not in the public interest. There is a great deal written on the subject of inappropriateness of punitive damages. There have been a number of suggestions concerning improvement of their use. I have tried to structure my presentation based upon my perceptions arising out of any practical experience.

Since punitive damages are for punishment and represent no "right" of the plaintiff, except as a representative of the public, it seems, at a minimum, that a standard greater than the preponderance of the evidence should be required. Like any penalty, the amount of the maximum exposure should be precisely defined, and, in product liability, should be uniform throughout the United States. Although I belong to a number of organizations which have as their fundamental thesis that there should be no punitive damages in the civil justice system, frankly, I don't agree with that. I do think there are a few unique cases in which the imposition of punitive damages in civil cases against manufacturers is appropriate. Furthermore, if is probably in the public interest to have such cases pursued. But any such law should provide the fundamental protections to a defendant who is being "penalized" that would be comparable to the protections that are afforded when one is charged with a crime and subject to punishment under the criminal law. Perhaps not identical, but certainly something more than exists in many of the present systems.

In general. I have some problem with caps on compensatory damages, even so-called non-economic damages. However, in the case of punitive damages there should be caps and such damages should be recoverable only once for any given course of conduct. Furthermore, punitive damages is a particularly inappropriate place to use the doctrine of respondeat superior as it is normally used in tort litigation. A corporation or individual employer, principle or the like should be responsible for conduct of his employees, agents or the like, only where the act leading to the punitive damages has been specifically authorized or it has been ratified by the

principle or employer with full knowledge of all the facts: I have emphasized that because it is unfair to penalize the employer if the employer accepts his employee's version in a factual dispute and the jury later concludes the employee's version is wrong where there is a reasonable basis for the employer to believe his own employee's version. After all, if the employer discharges the employee and the evidence later shows the conduct alleged did not occur, then he gets sued for wrongful discharge.

In summary, my own experience indicates that the legal justice system and more specifically, the product liability system in the United States, has created an imbalance in favor of the plaintiff and against the defendants which is having a serious adverse impact not only on the defendants in product liability litigation, but on the public welfare. My perception as a practicing lawyer is that the areas where correction are needed are the following:

1. Structure rules to bar the use of hindsight to evaluate the adequacy of product design, warning or labeling. Greater state of the art protection is needed. There should be certain presumptions established if statutory or regulatory approval has been obtained for particular aspects of the design, warning or labeling.

2. Although I have not addressed it in the text, I believe there is a requirement for appropriate time constraints. In my experience, many product liability claims are brought within the last month or even the last few days before the expiration of the statute of limitations. Often the manufacturer has had no notice that such a claim was pending until receiving the suit papers. If in fact the plaintiff has some reason to believe that such a claim is going to be asserted a notice requirement is not unreasonable. In many of these instances, the plaintiff does know, (or often in the pursuit of cases really initiated to recover a workmen's compensation lien, it is the plaintiff's employer or workmen's compensation carrier who has this knowledge). It may not be the subject of an appropriate federal statute, but I think there should be some reasonable notice of claim requirement. I believe there should be rebuttable presumptions that the product was without defect after the passage of a certain period of time and after some designated additional length of time. There should be reasonable statutes of repose and these should be uniform.

3. It is vital to structure a true allocation of liability based upon fault. To be effective, this must postulate determining comparative fault for both parties and nonparties and recovery strictly based upon that allocation. This also postulates an abolition of the joint and several liability rule except where tortfeasors have acted in concert.

4. There must be a substantial modification of the collateral source rule to provide recovery only for net economic loss. As my text indicates, there are a number of choices to be made on which reasonable minds could differ. But the fundamental fact that the plaintiff should not obtain double recovery should be paramount.

5. We should adopt doctrines and procedures that provide direct and indirect disincentives for asserting frivilous or questionable claims or defenses. A number of the reforms that are discussed elsewhere here do provide such disincentives as an incidental benefit.

6. Disencourage forum shopping. Uniform laws will help to do this.

7. The development of alternate procedures to litigation particularly to avoid the expenses and delay of litigation when the actual net loss to the claimant is low compared to the expenses and burden of the litigation process. These procedures must preserve a reasonable opportunity to recover on valid claims through an expeditious and inexpensive procedure with reasonable compensating protections to the manufacturers.

8. Severe limitation on the imposition of punitive damages.

9. Although I have not addressed this subject because it is probably not an appropriate subject for federal legislation, I think that major restructuring of discovery process in products cases (and indeed in other cases) must take place. Imposing substantially greater burdens and expense upon the moving party in appropriate instances is one example of a necessary improvement if it can be structured so that it is even-handed. Unfortunately, since the plaintiffs often don't have any money and the defendants do, such rules have a tendency not to be evenhanded. In any event, burdensome discovery should be allowed only when there is an adequate showing of good cause.

It may be that in the passage of time in federal cases an imposition of penalties under Rule 11 may help bring such cost back into line. However, by far the most important way of limiting discovery is to provide limitations that cause fewer cases to be tried and reduce those unreasonable risks and uncertainties of litigation that exist today. Much of the discovery is the result of the unpredictably substantial risks that in turn justifies crossing every t and dotting every i in the discovery con-

test because of exposure to the defendant and the potential "big hit" for the plaintiff.

I strongly feel that there is drastic need for reform in the product liability system. I find the arguments made against such need for reforms to be disingenious, often by setting up of straw men and with a disregard of what is clear to see if one litigates as ones life's work. The evidence in my judgment is so obvious that it is difficult to understand why it is not perceived for what it is. It is necessary in structuring any changes to make sure that we do not make the same mistake in trying to bring the balance back to something fundamentally even from a balance that unfairly favors the claimant, by going too far the other way. But change we must.

I will be happy to answer any questions you may have.

Thank you.

Senator KASTEN. Mr. Reynolds, we thank you for your testimony.

Our next witness on this panel is Mr. Alfred W. Cortese, representing the National Coalition for Litigation Cost Containment.

Mr. Cortese.

Mr. CORTESE. Thank you, Mr. Chairman, Senator Hollings.

I am delighted to appear today to testify on behalf of the National Coalition——

Senator KASTEN. You might want to get that microphone a little bit closer to you. They do not carry very well unless you are almost on top of them.

Mr. CORTESE. Our membership consists of defense bar associations, trade associations, corporations, lawyers, and others who are interested in reducing unnecessary litigation costs arising from the abuse of the existing system.

I also am a trial attorney, and I am a trial attorney very much interested in tort reform, which is the principal goal of our coalition. We support tort reform activities on both the State and the national level, and therefore we applaud this committee's efforts to reform legislation in that area.

Our coalition is sponsored and supported by four national defense counsel associations, with thousands of members throughout the United States. The Defense Research Institute is one of the organizations. The initial concern of these groups was with the cost of litigation. Our members had become increasingly aware that they were engaged in a process which was rapidly pricing itself out of the market.

Tort litigation has become increasingly expensive. There are few small cases. Every case must be defended, and for that matter prosecuted, as if it involved extremely high stakes, which it very, very often does. This is the result of developments during the past 20 years which have substantially eroded the reasonableness and balance which ought to be inherent in the law of torts.

The solution we believe is tort reform which restores some balance to the system. We strongly support Senator Kasten's amendment, because we believe it supplies that balance, and that it will serve as a model for State tort reform efforts. It improves the product liability system by placing reasonable limitations on the systems' excesses, by ensuring that the system operates to compensate injuries caused by the wrongdoing of others, and by returning to a fault-based system.

The elimination of unfairly excessive damage awards is critically important. The bill should accomplish that objective by the provisions capping noneconomic damages, by eliminating double recov-

ery through credits from collateral source payments, and by the scheduling of attorneys' contingency fees.

Equally important is the principle that liability must be based on fault. Finally, we believe that joint liability is fundamentally unfair, and we strongly support the bill's limits on joint liability.

The coalition is also indebted to Senator Danforth and his staff for their tireless efforts at molding a concensus in support of product liability legislation. However, the latest version of S. 1999 we believe is far too complex. There are so many novel procedures and concepts that it is likely to spawn additional litigation and transaction costs.

Echoing Professor O'Connell, whom Professor Owen recalled, referred to the Joycian nature of the statute, we think that perhaps this draft has moved from Ulysses to portrait of the artist and we hope that it will progress to a Joyce short story. Appropriate models might be "Ivy Day in the Committee Room," or, hopefully not, "A Painful Case."

On a positive note, we support S. 1999's limitations on punitive damages. We also support alternative dispute resolution. An expedited settlement structure allows settlement without fear that offers would be interpreted as weakness. However, the bill's expedited settlement procedure creates a separate prelitigation administrative structure for handling claims which renders it cumbersome and unwieldy.

We also feel that a separate system also runs the risk of dramatically expanding the frequency of often unwarranted claims. A better approach would be to have a settlement procedure that takes effect only after commencement of an action. I believe that is what Senator Gorton suggested this morning.

The NCLCC is also concerned with the draft's record retention provisions. We believe that these provisions are overbroad, costly, and merely duplicative of current record retention and evidentiary rules.

Finally, the coalition is concerned about the introduction of the concept of dignitary loss as a Federal statutory element of damages. Dignitary loss is a confusing, invasive, and slippery standard for noneconomic recovery. We therefore believe that dignitary loss should have a dignified interment.

The better approach, we believe, would be an overall cap on damages. Historically the tort system was intended to compensate for actual losses and to deter wrongdoing. While it may be fair to permit claimants to seek compensation for noneconomic injuries, noneconomic damages should be limited. Whatever the standard, however, limiting noneconomic damages would assure that such damages were reasonable in proportion to actual losses, and would maintain equity among claimants.

I would like to thank the committee for the leadership on this most difficult issue, and to express the willingness of the national coalition to work with the Congress in fashioning acceptable product liability reform legislation.

Thank you very much.

[The statement follows:]

STATEMENT OF ALFRED W. CORTESE, JR., COUNSEL, STEERING COMMITTEE MEMBER, NATIONAL COALITION FOR LITIGATION COST CONTAINMENT

Mr. Chairman and members of the Subcommittee, I am delighted to appear today to testify on behalf of the National Coalition for Litigation Cost Containment (NCLCC). The NCLCC is a coalition of corporations, individuals, and associations interested in reducing unnecessary litigation costs arising from the abuse of existing litigation procedures and statutes. Its membership consists of defense bar associations, trade associations, corporations, lawyers, and others interested in issues such as discovery abuse, liability determination and damage awards, improved case and courtroom practices, and the need for better qualified, better paid judges.

The NCLCC's principal goal is tort reform. Our basic approach is an intensive pro-active program conducted at the state level. We support activities on both state and national levels designed to address our purposes and create public awareness and understanding of the issues. The NCLCC promotes constructive steps by legislative and judicial bodies and seeks to assist in the formulation of public policy in these areas. Accordingly, the NCLCC applauds Senator Kasten's and Senator Danforth's legislative reform efforts and appreciates the opportunity to comment on the existing proposals.

The NCLCC is sponsored and supported by four national defense counsel associations with thousands of members throughout the United States: the Defense Research Institute, the Federal of Insurance and Corporate Counsel, the International Association of Insurance Counsel and the Association of Insurance Attorneys.

The objectives and programs of the the National Coalition grew out of the Statement and Report of the Defense Trial Lawyers' Task Force on Litigation Cost Containment, a study conducted by the four national defense associations.

The initial concern of these groups was with the *cost* of litigation. From a very parochial point of view, the members had become increasingly aware that they were engaged in a process which was rapidly pricing itself out of the market. There was a perception among the public and among the users of the judicial system that the transaction costs involved in litigation were too high and would soon become prohibitive. Whether that perception was justified or not was seen as less important that the fact that it existed.

In general, the study group was aware that litigation had become increasingly expensive in the personal injury field because there are few small cases. Every case must be defended—and, for that matter prosecuted—as if it involved an enormous sum of money because, in fact, it very well may. This situation has come about because of developments during the past twenty or so years which have substantially eroded the reasonableness and balance which ought to be inherent in the law of torts.

The basic conclusion of the study was that excessive verdicts and settlements and the high cost of litigation have reached a level which threatens the continued existence of our system of civil justice. The solution to that problem is tort reform which restores balance and a sense of proportion to results.

We believe that Senator Kasten's Amendment No. 1814 to S. 100, the Product Liability Reform Act of 1986, appropriately addresses several of our goals and will serve as a model for state tort reform efforts. The proposal improves the product liability system by placing reasonable limitations on the system's excesses, by ensuring that the system operates to compensate injuries caused by the wrongdoing of others, and by returning to a fault-based system. The proposal's objectives are therefore consistent with the NCLCC's overall reform objectives.

In particular, the NCLCC commends the proposal's elimination of unfairly excessive damage awards. The cap on non-economic damages, the periodic payment provision and the elimination of double recovery through collateral sources are essential to this end.

The proposal is also praiseworthy in its reduction of the unacceptably high transaction costs associated with litigation. The scheduling of attorneys' contingency fees to decrease as awards increase is a necessary step toward eliminating the grossly disproportional compensation to plaintiffs' attorneys and reducing litigation transaction costs.

The NCLCC also agrees with the proposal's encouragement of alternative dispute resolution development and other evidentiary and procedural reforms. Indeed, wherever arbitration and mediation are reasonably adequate methods to resolve disputes, they will streamline the tort law system and allow for a greater percentage of the tort judgment to compensate an injured person. Alternative dispute resolution methods are important tools for achieving legal cost containment.

The NCLCC also supports the Kasten proposal's requirement that liability be based on fault. A no-fault standard imposes liability on desirable as well as undesirable activities and undermines the system by holding defendants liable for conduct which was proper. However, we have some concern that the legislative language may not accomplish the objective of fault based liability and hope to have the opportunity to work with this Committee to ensure that it does.

Finally, the NCLCC believes that joint liability is fundamentally unfair except where joint tortfeasors can be shown to have acted in concert. Accordingly, we support the proposal's limits on the applicability of joint and several liability. As litigation becomes more complex it is increasingly likely to involve a multitude of parties, particularly defendants. The doctrine of joint and several liability imposes on each defendant the potential for being the ultimate payor of the entire verdict. Thus, a case becomes a high-stakes case for every defendant, even for those whose legal culpability is very small. Each defendant must defend vigorously and as if it were the only defendant. The result is the involvement of many lawyers in a single case, the expanded use of discovery, and, in general, the multiplication of costs.

The application of the doctrine of joint and several liability in many instances leads to a grossly unfair allocation of the final payments for injury among culpable and financially responsible defendants. Worse yet, it may require a defendant who is only slightly responsible for plaintiff's loss to pay the entire loss because of the financial irresponsibility of a co-defendant who is by far the largest contributor to the occurrence and resulting injury. The theoretical concept which provoked the doctrine posits that because each defendant has contributed, no matter how slightly, to the plaintiff's loss, all are responsible for the entire loss. The fact is, however, in these modern days of comparative fault the more rational concept is that each defendant should pay its fair share of the injury and damage, as indeed, the plaintiff should absorb that portion of his own damage for which he is responsible.

The NCLCC is also indebted to Senator Danforth and his staff for their tireless efforts at molding a consensus in support of product liability legislation. Substantial progress has been made, but the latest version of S.1999 presents some serious problems. On a positive note, the NCLCC supports S.1999's limitations on punitive damages. The NCLCC also supports the inclusion of an alternative dispute resolution system, complete with economic incentives. The expedited product liability settlement claim system, by spelling out specific procedures and claim elements, allows people to settle disputes without fear that settlement offers would be interpreted to weaken their positions.

As currently drafted, however, S.1999's expedited settlement claim system creates a separate, pre-litigation administrative structure for handling claims. There is much to commend this type of informal process outside the legal system. The NCLCC believes, nonetheless, that establishing a new, separate procedure would necessitate incorporating many new and detailed sub-procedures. This would render S.1999 cumbersome and unwieldy. A separate product liability dispute resolution system also runs the risk of dramatically expanding the frequency of often unwarranted claims.

A better approach would be to have a settlement procedure that takes effect only after commencement of an action. Beginning the process with the filing of the complaint will better accommodate existing procedural rules. Such a process will be less intrusive on states. Since under either an informal or formal procedure the claimant is presumed likely to use an attorney, little or no savings of legal costs may be gained by the proscribed informality. An expedited settlement claim system which may kick in after a complaint has been filed and which uses existing procedural rules reduces transaction costs and is, therefore, the best method of accomplishing the goals of an expedited settlement system.

Although economic incentives in an alternative dispute resolution system are desirable because they clearly facilitate settlement,[1] S.1999's economic incentives are somewhat lopsided. The economic incentives are much harsher on manufacturers or product sellers than they are on claimants. For example, S.1999 does not impose sanctions on a claimant who has rejected a manufacturer's or product seller's settlement tender where the manufacturer or product seller has been found not liable in a civil action. Claimants are not subject to any penalties for having brought and having failed to settle frivolous claims. Unsuccessful claimants and their attorneys should be required to pay the manufacturer's or product seller's costs and attorney's fees when they reject a settlement offer.

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[1] See Offers that Can't be Refused: Foreclosure of Personal Injury Claims be Defendants' Prompt Tender of Claimant's Net Economic Loss, 77 N.W. U.L. Rev. 589 (1983).

The NCLCC also disagrees with S. 1999 concerning joint and several liability. Instead, we support the objectives of the Pressler Amendment and the Kasten bill which limit the applicability of joint liability to situations where each defendent has acted in wrongful concert of action.

The NCLCC is also concerned with S. 1999's record retention provisions. We believe that sections 301(a) and 301(b) are overbroad, costly and merely duplicative of current record retention and evidentiary rules. These sections are designed to deter the willful destruction of evidence and penalize those who do so. Such destruction is illegal and adequately penalized under the existing adverse inference rule.[2]

Section 301(c) seeks to extend the scope of the adverse inference rule. Such an extension would undermine the rule as a punitive measure which operates only against those acting in bad faith.

If enacted, Section 301(c) would operate as a "super penalty" in permitting the adverse inference rule to be applied to those who non-willfully destroy certain documents. Such a super penalty goes far beyond the level of deterrence required to prevent the destruction of evidence. Moreover, in the case of non-willful destruction, the knowledge of a penalty will have no deterrent effect because a person who inadvertently destroys certain records does not have the requisite "guilty" state of mind upon which deterrence depends.

Section 301(c) would also undercut the rationale of the adverse inference rule. Human experience has shown that a party's willful destruction of a document invariably leads to the related factual conclusion that the party destroyed the document because it harmed his position. The adverse inference rule therefore operates as a fair approximation of the truth. Without the element of bad faith, this reasoning process breaks down and the fact that the evidence was adverse to the party who destroyed it cannot be fairly inferred. Therefore, the interests of justice and truth in litigation would not be served by enacting section 301(c) into law.

Finally, the NCLCC is concerned about the introduction of the concept of "dignitary loss" as a federal statutory element of damages. Dignitary loss is a confusing, invasive and slippery standard for non-economic recovery. We therefore believe that dignitary loss should have a dignified interment. The better approach, taken in the Kasten bill, would be to set an overall cap on non-economic damages.

Historically, the tort system was intended to compensate persons who suffer wrongful injuries. Today, because of shockingly large injury awards, the tort system has become a kind of lottery, where damage awards bear no relation to any actual injury.

In particular, juries have awarded damages for non-economic losses—pain and suffering, metal anguish, fear of disease, risk of disease and others—out of all proportion to the alleged injury. Economic losses, such as lost wages and medical bills, can be estimated with relative accuracy, based on objective standards of current costs, benefits, and salaries and on quantifiable estimates for the future. Non-economic losses are not tied to such objective standards. They are inherently open-ended and cannot easily be reviewed for reasonableness and conformity with evidence. Insurers have particular difficulty predicting non-economic damages, which vary widely from claimant to claimant. Finally, because they are so difficult to quantify, non-economic losses can become a major obstacle to settlement.

Accordingly, while it is fair to permit claimants to seek compensation for non-economic injuries, non-economic damages should be limited. The Kasten approach, of course, sets a non-economic damage cap of $100,000 per occurrence. Some other figure or method of limitation might be just as appropriate. But whatever the standard, limiting non-economic damages would assure that such damages are reasonable in proportion to actual losses and would maintain equity among claimants.

In conclusion, I would again like to thank the Committee for their leadership on this most difficult issue and to express the willingness of the National Coalition to work with the Congress in fashioning acceptable product liability reform legislation.

Senator KASTEN. Thank you very much for your testimony. We also look forward to working with you.

Mr. Chief Justice, I want to read you a part of a speech recently given by the Chief Justice of the United States, Mr. Warren Burger, and then ask for your response.

He says:

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[2] See, e.g., "Wigmore on Evidence § 291 (Chadbourn rev. 1979); Nation-Wide Check Corp. v. Forest Hills Distributors Inc.," 692 F.2d 214 (1st Cir. 1982).

Occasionally I have seen news accounts of some individual who has purported to make a study of the whole system of justice in the United States and come to the conclusion that what has been called a litigation explosion is largely mythology. Those researchers are scholars, if they can appropriately be called such, and must have been studying the figures originating in Guam or Luxembourg, but surely not the hard figures open for everyone to see in the United States. Steven Daniels, Project Director at the American Bar Foundation, wrote recently "the United States is presently experiencing a legal explosion." As plausible as it may appear, exponential extrapolation of increases over the last decade suggests that by the early 21st Century, just 14 years from now, the Federal appellate courts alone will decide approximately one million cases each year. That bench would include approximately 5,000 judges, and the Federal Reporter would expand to more than 1,000 volumes each year. Mr. Daniels studied and had access to more data than I have had time to analyze, but he is far more near the bullseye than those optimistic library analysts who say the litigation explosion is a myth. Those alleged scholars who say we have no problem seem unaware that in my tenure of office active Federal judgeships have been increased by Congress from 424 to 753, and we need more.

There has been a lot of discussion this morning, and now this afternoon, about whether or not there is a crisis. From your point of view, Mr. Chief Justice, is the Chief Justice of the Supreme Court Warren Burger correct when he talks about this crisis, and do you believe that we all, all of us, have a responsibility to do something about it?

Judge CARRICO. Far be it from me, Senator, to question the word of the Chief Justice of the United States. I respect him too much. I think, though, that there is a large element of opinion in the analysis of the situation. Now the study that I referred to, and which I made available to the committee, is from research of the National Center for State Courts, and I have high regard for that particular organization. I do not know the gentleman who did this study, personally but they at the national center are a very careful group in their research.

He relied on data from 20 States. I suspect that he did that because of the availability of reports covering the various categories of cases that he was analyzing. Not all States report that clearly. Mine does not. We have broad categories of civil law, criminal, and so forth and so on, but as I say, it is all a matter of opinion.

Now my own experience in Virginia—I can give you the figures. In the period from 1978 to 1981, we had an 11.5-percent increase in the total civil caseload. Now the civil caseload includes not only tort actions, but domestic relations causes, and property cases as well. There was an 11.5-percent increase between 1978 and 1981. But that caseload declined about 1 percent between 1981 and 1984.

Now the purely law cases, those that would include tort actions which also would include, of course, product liability cases, increased by 7 percent between 1978 and 1981, lagging behind the overall increase in civil litigation. They did increase rather than decrease between 1981 and 1984. That percentage was only 1.8 percent.

So with what I live with every day, I cannot fairly call it a crisis. The General Assembly of Virginia has been responsive to the court's recommendations for creating new judicial vacancies where we find overloads in particular dockets throughout the State, and a litigant in Virginia is fairly well assured of an early trial of his case.

So I cannot say that the result reached by the national center is inaccurate. But as I say, I would not attempt to question what the

Chief Justice of the United States has said. He sees this, of course, from a much larger perspective I am sure than I do, and has the advantage of a great deal more material to study, but my own personal experience would not substantiate calling our situation in Virginia a crisis.

Senator KASTEN. Senator Hollings.

Senator HOLLINGS. Chief Justice, I appreciate that, because this is the kind of thing that disturbed this Senator in talking to my judges, both State and Federal.

Along that line, let me comment to this extent. What we are really doing in this committee is trying to handle just one particular part of the entire tort law products liability. I represented products manufacturers, and I know what my testimony would be: We want predictability; we want to know what our costs are; but we will sell our products in any one of the 50 States. We are in business now. We are not going out of business.

I would hate to see this same legislation handled by the Labor and Human Resources Committee under, let us say, a more liberal a Democratic administration. A Federal precedent could be established here that could come around and knock proponents in the head. We have got fairly responsible court systems in Virginia, and in South Carolina, and in the majority of States. It just does not strike me as a smart thing to disrupt the current system. But, like the sheepdog who tasted blood and gobbled up all the rights in tort cases, to momentarily establish a Federal precedent would, in reality, bring chaos in a multiplicity of suits, and misunderstandings, and appellate work. Costs would go up.

This is not going to minimize legal costs. It is going to maximize it. And then at a later date, when we have a Federal law in this area, you are going to really see money being paid to plaintiffs. I know how this crowd thinks up here. They would have a window and if you tripped over your shoe, you could go over and get paid for any injury.

I congratulate you, Mr. Few, and your son for doing this research for us at your own cost. I notice jury verdict research being used by the Attorney General and by his study group. Then they tell me that the basis of the research is newspaper clippings. That is what I found out, that it was newspaper clippings. I said, go to the largest county in my State—namely Greenville—because it was said that smaller counties were more conservative.

So go to the largest with the most litigation and find out what you find to substantiate this conclusion of the Attorney General. Well, Greenville is said to be 3 percent above the national average with respect to litigation and awards. Now the national average is an explosion according to the Attorney General. We are 3 percent above it. I found out the actual statistical material. Greenville has $16,000 average verdict with 63 percent of the plaintiffs winning, 37 percent of the defendants winning. No verdict of $100,000 or more in that whole area. The charge of outrageous awards generally is just as fallacious as it can be.

We have gotten the bum's rush. We do not have statistical substantiation for these charges. Let me ask the question, because we are always limited in time.

How long does it take to get a products case, Mr. Few, to trial in South Carolina?

Mr. FEW. Your Honor, in my experience it has been around a year and statistics from the court administrator's office in South Carolina say that 98 percent of civil cases pending in South Carolina have been pending for less than a year.

Senator HOLLINGS. All right. Let me ask you, what is wrong with abolishing joint and several liability?

Mr. FEW. Well, what is going to happen if joint and several liability is abolished in the way Senator Kasten and the way Senator Danforth seek to abolish it is that a defendant, and I would like to take my example No. 2 on page 15 of the typical cases that I have set forth, Senator Kasten, which involved a retired textile worker whose leg was amputated because of a defective rototiller where the manufacturer had patented three separate safety devices prior to manufacturing this that specifically said, we foresee this rototiller going into reverse as being a problem because it might injure somebody and they might be killed or lose their leg, and yet they put none of these devices on this machine, and the man as a result was stabbed in his calf by a tine on a rototiller that of course has dirt on it.

He was taken to the Anderson Hospital, and a surgeon there, we believe, put forth a heroic effort to save him. But if your bill passes, then what will happen as a practical matter is that when we file suit against the manufacturer of that rototiller, he is going to turn around and say, oh, no, the doctor should have saved the leg. Therefore, the doctor is also liable. And the doctor is at least 50 percent liable. So your bill, Senator Kasten and I believe Senator Danforth's says, that he is going to get a credit for that, the manufacturer, whether that defendant is in the suit or not.

Well, the only way that we are going to be able to get that doctor to come in and prove that it wasn't his negligence that caused this is to make the doctor a party. So when we do that, then they have got somebody to come in and defend it and say no, it was not us.

Well, the lawyers we have around our area are going to think of somebody else to blame it on. What is going to happen, and I looked through all of these cases, and I think out of the 24 of them I could see at least 18 where there would have been multiple defendants that would have to be added.

Well, if you have say six defendants in a lawsuit, including the manufacturer, you have six different law firms, you have got six different insurance companies, and we want to take a deposition. So it has got to meet the convenience of six different law firms.

Then when we get into the trial of the case, we have got seven different parties presenting evidence. So a case which takes me and these 644 cases that went to jury trial, took an average of approximately a day and a half to try in South Carolina, and that was within a year of being filed, now it is going to take us 2 or 3 years to get to trial, and it is going to take us 2 or 3 weeks to try the case.

I think that maybe that is something, Senator, that you all have not considered. But I can tell you that, because I know it, because I have been down there.

Senator HOLLINGS. Now what about the effect of a cap on the settlement in the Danforth bill? What effect does that have?

Mr. FEW. Someone asked earlier what percentage of these cases, Senator Kasten, were settled. So of the ones I have listed here, there are 20 of them that I was involved in. Three of them were tried through to verdict; that is 15 percent. Three of them settled prior to trial. And one of them settled after trial. And the reason that they settled is this: I know for my client that I may walk away from the courtroom with nothing and my client may walk away from the courtroom with nothing, and they know that the jury may give a full and complete verdict. So they have got an incentive to settle and I have got an incentive to settle.

But let us say you put a $100,000 cap in there. Every case is going to trial. They are never going to offer me $100,000. Why? Because that is their upper limit.

So my catastrophically injured client, who has been burned over 80 percent of his body who lay there in the hospital for 3 weeks in the most exquisite pain, whose loving wife and children have had to sit there and watch the man die, the most they are going to offer me is $50,000. They do not care if I go over there and get a verdict for $100,000; that is the most I can get. They have got no incentive.

So the way I have settled 65 percent of my cases, I would say that at least 65 percent of them will go through trial and probably more.

Senator HOLLINGS. What is wrong with abolishing the collateral source rule?

Mr. FEW. Well, here is what will happen with the abolition of the collateral source rule. I like to give a very simple example so if anybody who had not been involved in litigation can understand it. Let us take a small verdict case. Let us take a man who had $5,000 in a jury award and he was wise enough to ensure himself by acquiring Blue Cross-Blue Shield Hospital Insurance, and he had a $1,000 hospital bill.

OK? Blue Cross-Blue Shield—every one of those policies provides for subrogation; so he has got to pay them back $1,000 out of his reward. That reduces it to $4,000. Now if he had the good judgment to do that, then the judge, until Senator Kasten's bill and Senator Dansforth's bill, is going to deduct another $1,000. But if he was irresponsible or maybe not financially able to do so and did not have the insurance, then he comes out $1,000 ahead.

There the collateral source rule, Senator Kasten, is a rule that has been developed by the greatest legal minds in our country over a period of 210 years since we became independent. And for this committee who does not know this—this committee does not know what the practical effects of all of these sweeping changes are going to be. You are going to throw our litigation system into such chaos that every Supreme Court of every State in the United States is going to be bogged down in trying to interpret what this new language means.

Now, Senator, we have 46 States that have adopted section 402(a). And I am referring to the restatement of torts by the American Law Institute. And that is not just plaintiff's lawyers; that is plaintiff's lawyers, that is defendant's lawyers, that is judges—that is the people who are respected in our profession.

And that says this: that if a manufacturer or a seller sells a defective and unreasonably dangerous product, then the person who is injured by that defective and unreasonably dangerous product can recover such damages as a jury of our fellow citizens who are basically conservative, fair-minded and equitable and who believe in Newton's first universal law of motion and that is that money at rest in insurance companies will tend to remain at rest until we can present an overwhelming case to show undoubtedly that we are entitled to it.

Second, on failure to warn, section 388——

Senator KASTEN. Thank you very much, Mr. Few.

Let me say that there are a number of questions for this panel that have come to us, and I have got a couple also. In the interest of time, I may submit those questions to you for the record. I very much appreciate all of your testimony and the subcommittee appreciates it.

Our next panel——

Senator HOLLINGS. Could I ask the Chief Justice, do you think that they would institute a Federal cause of action or not? Do you think these bills here in product liability—do I now have under these bills a Federal cause of action? I do not find them to institute a Federal cause of action in court. I do not think so either. I keep reading and they act and they talk as if they do, but then they do not.

Judge CARRICO. I do not think so.

Senator HOLLINGS. Now in the 50 States the Federal guidelines will be interpreted in order to make a finding. But as you testified, the Supreme Court is going to have to make the ultimate finding.

Judge CARRICO. It is going to get to them, whether the bill confers Federal question jurisdiction or not, because the same case is going to go into a Federal court under diversity jurisdiction and get ultimately to the Supreme Court. The proposed legislation seriously affects the role of my type of court in this area: the decision of a State supreme court on a matter of purely of State law is now final and binding; this legislation changes that with respect to product liability cases.

Senator HOLLINGS. That is what I am thinking.

Judge CARRICO. Whether the Federal question of jurisdiction is conferred or not, it is changed because the same case will get to the Supreme Court through diversity.

Senator HOLLINGS. Thank you, sir.

Senator KASTEN. Gentlemen, we thank you—gentlemen and lady. Thank you very much.

Our next panel: Mr. Fitch, Mr. Hunter, Mr. Connolly, and Mr. Cheek.

First witness on this panel is Mr. Johnny C. Finch, Senior Associate Director, General Government Division of the U.S. General Accounting Office, accompanied by Mr. Gandhi, who is the Group Director of Tax Policy of the General Accounting Office.

Mr. Finch.

STATEMENTS OF JOHNNY C. FINCH, SENIOR ASSOCIATE DIRECTOR, GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY NATWAR M. GANDHI, GROUP DIRECTOR OF TAX POLICY; WILLIAM W. SUTTLE, SENIOR VICE PRESIDENT, AMERICAN INSURANCE ASSOCIATION, ACCOMPANIED BY PETER A. LEFKIN, COUNSEL; LESLIE CHEEK, VICE PRESIDENT, FEDERAL AFFAIRS, CRUM & FORSTER INSURANCE CO.; J. ROBERT HUNTER, PRESIDENT, NATIONAL INSURANCE CONSUMER ORGANIZATION, ACCOMPANIED BY JAY ANGOFF, COUNSEL

Mr. FINCH. Thank you, Mr. Chairman.

With your permission, sir, and given the lateness of the day and the time, I will submit a detailed statement for the record and summarize very quickly.

We are pleased for the opportunity to assist the subcommittee in its deliberations. Our focus today will be on the subject of the insurance industry. We will address our remarks to the following issues:

(1) the property/casualty industry's pricing strategies, particularly as they relate to cash-flow underwriting; (2) industry profitability; (3) the cyclical nature of that profitability; (4) the financial outlook for the industry; and (5) some of the current difficulties in the property/casualty industry, specifically as they relate to the general liability insurance line.

In addressing these issues, we will make the following points: Property/casualty companies have used a pricing strategy which sacrified underwriting profit margins in order to generate cash for investment purposes. As a result of this strategy, the property/casualty industry has made, depending upon whose estimates are used, between $52 billion and $79 billion in net gains over the last 10 years.

Furthermore, like many other businesses, property/casualty underwriting is subject to profitability cycles. While underwriting losses have mounted since 1980, the estimated data for 1985 indicates that the underwriting cycle has turned and is now moving in a positive direction. Indeed, the industry itself is projecting substantial net gains of more than $90 billion over the next 5 years.

Although the financial outlook for the industry as a whole appears favorable, the current difficulties are more pronounced in certain lines. One insurance line often mentioned in the context of high premiums and lack of availability is the general liability line. The general liability line does not represent a major portion of the total property casualty insurance business.

Attachment 3 to my detailed statement shows, for 1985, the relationship of this line to other property/casualty lines. That attachment shows that the general liability line represents a relatively small portion of the industry, accounting for about 7 percent of all property/casualty premiums written in 1985. However, underwriting losses attributable to this line accounted for about 22 percent of all underwriting losses.

It should be noted, Mr. Chairman, that if a given company had specialized in this line of insurance, the proportion of losses could have been higher.

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Attachment 4 shows our analysis of the amount of additional earned premium revenues that would have been needed for the general liability insurance line to have broken even in 1984. Basically our analysis shows that in 1984 the line could have broken even with an approximate 30-percent additional increase in earned premium revenues.

I would like to make three points about our analysis. First, our analysis is based upon aggregate industry financial data which already includes the premium changes that took place in that year. Second, it is not appropriate to compare our industrywide breakeven analysis to individual policy rate increases. Third, let me repeat my earlier observation that the experience of individual underwriters could vary significantly from the industrywide aggregates.

In conclusion, Mr. Chairman, available financial information shows that over the long term, the profitability of the property/casualty industry has been cyclical in nature. The data further indicate that over the last 10 years, the industry has been generally profitable. There was an overall loss in 1984; however the industry projects increasing premiums and more favorable prospects for the next few years. Indeed, the industry's estimates indicate a return to profitability in 1985. The data also shows that while general liability insurance has received considerable attention recently, it represents a relatively small portion of the industry overall.

Finally, our calculations show that for 1984 the general liability line could have broken even with a 30-percent increase in earned premium revenues.

That concludes my statement, Mr. Chairman. I would be pleased to respond to your questions.

[The statement follows:]

STATEMENT OF JOHNNY C. FINCH, SENIOR ASSOCIATE DIRECTOR, GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE

Mr. Chairman and Members of the Subcommittee, we are pleased for the opportunity to assist the Subcommittee in its deliberations on the subject of the insurance industry. We will address our remarks today to (1) the property/casualty industry's pricing strategies, particularly as they relate to "cash flow underwiting"; (2) industry profitability; (3) the cyclical nature of that profitability; (4) the financial outlook for the industry; and (5) the current difficulties in the property/casualty industry, specifically as they relate to the general liability insurance line.

In addressing these issues, we will make the following points. Property/casualty companies have used a pricing strategy which sacrificed underwriting profit margins in order to generate cash for investment purposes. As a result of this strategy, the property/casualty industry has made, depending upon whose estimates are used, between $52 and $79 billion in net gains over the last 10 years. Furthermore, like many other businesses, property/casualty underwriting is subject to profitability cycles. While underwriting losses have mounted since 1980, estimated data for 1985 indicates that the underwriting cycle has turned and is now moving in a positive direction. Indeed, the industry itself is projecting substantial net gains over the next 5 years.

The current difficulties in liability insurance are found principally in certain liability insurance lines. One line frequently mentioned by the media within a crisis context is general liability. This line represents a small portion, about 7 percent, of the total property/casualty business. Furthermore, our computations show that, with a 30 percent increase in earned premium revenues, this line could have broken even in 1984.

I will now discuss these points in greater detail. In doing so, I will explain the sources of our data and the scope of our work.

PROPERTY/CASUALTY COMPANY PRICING STRATEGIES

A property/casualty company derives its income from two principal areas: underwriting gains, which are the excess of premiums over claims and expenses, and investment gains. Because of investment gains, a property/casualty company can have net income even though its premium revenues alone are not large enough to cover claims and expenses.

Thus, the ability to offset underwriting losses with investment income plays an important role in a company's pricing strategy—that is, the amount it charges for the insurance that it offers. For a number of years, many companies have employed a pricing strategy known as cash flow underwriting. Basically, companies have been willing to accept lower premiums for certain insurance lines in order to encourage sales and obtain funds for investment. In essence, the strategy has been to sacrifice underwriting gains for investment gains. For example, in 1984, claims, expenses, and policyholder dividends exceeded premium revenues by almost 18 percent.

The companies, however, have taken this risk because they expected to make up the premium shortfall through investment income. Through the increased volume of premiums resulting from this pricing approach, companies were able to generate a larger amount of net cash flow which they could then invest to earn additional investment income. For instance, over the 5-year period 1980–1984, when the industry's claims and expenses exceeded premiums by about 9 percent, its underwriting loss was about $45 billion. Even so, the industry had $82 billion in investment gain which, when offset against its underwriting losses, resulted in a net gain of about $37 billion. The investment gain was made possible, at least in part, by the industry's pricing strategy which generated about $66 billion in net cash flow. The industry was then able to invest these funds at favorable rates.

From 1975 to 1983, investment gains, in the aggregate, have exceeded underwriting losses by a fairly wide margin. However, this situation changed in 1984, when underwriting losses for the industry were $19.4 billion while investment gains were $17.9 billion. Reacting to this result, some companies have sharply raised premiums.

PROFITABILITY OF THE PROPERTY/CASUALTY INDUSTRY

We developed a financial overview of the property/casualty insurance industry using financial data for the 10-year period 1976 through 1985. We obtained the 1976–1984 data from Best's Aggregates and Averages and the 1985 data from Best's Insurance Management Reports, dated April 7, 1986. The 1985 data were estimated by Best's since final 1985 operating results were not, and are still not, available. While Best's reports omit figures for many small or new companies, we believe that the data are representative of the overall financial results of the property/casualty industry.

In the table below, we show sources of property/casualty income broken out by underwriting gains, investment gains, and total gains. This table clearly illustrates the results of the industry's pricing strategy to obtain investment income at the expense of underwriting income. While property/casualty companies will have about $65 billion in undewriting losses, they also will earn about $144 billion from their investments during this 10-year period. Overall, the industry will have a net gain of about $79 billion.

All companies—Consolidated basis 1976 through 1985 (1985) estimated

	Billions
Underwriting gains/(losses)	$64.5
Investment gains	143.8
Net gains	79.3

We would like to make two points about our figures which may differentiate them from figures developed by others. First, the investment gains include net investment income and both realized and unrealized capital gains. We recognize that unrealized gains are just that, unrealized, and, therefore, are subject to investment risks which could result in lower or higher amounts. However, we have chosen to include unrealized gains in our figures because it is within a company's control to manage its investment portfolio so as to realize these gains while the investments are profitable.

Second, the underwriting losses do not reflect policyholder dividends. We consider these dividends to be voluntary, not mandatory, distributions by the companies. Since the companies are not required to make these distributions, we have chosen to exclude them from our underwriting loss figures.

Even if we adjusted our figures to exclude unrealized gains and to include policyholder dividends (the approach used by the industry for its calculation), the industry's net gain for this 10-year period would still be about $52 billion. In either case, it is within management's discretion to realize investment gains or to not pay policyholders' dividends.

CYCLICAL NATURE OF INDUSTRY PROFITABILITY

While it is important to look at the figures for the most recent years, it should be noted that over the longer period the property/casualty industry has demonstrated profit and loss cylces. We believe that data covering longer periods give a more complete picture of the industry's profitability.

Unlike most other industries, the property/casualty insurance industry is flexible with respect to capacity or supply. During profitable periods insurance companies can increase their capacity, take varied and greater risks, and generally lower their premium rates to achieve a greater market share. Such actions result in price competition as other firms lower their prices to retain their market share. Price competition results in a change from favorable premium profit margins to unfavorable margins, resulting in the underwriting profit and loss cycles.

Attachments I and II illustrate the cyclical nature of the property/casualty industry profitability. Attachment I shows the year-by-year underwriting and investment results for the 12-year period from 1974 through 1985. Column 2 in that attachment, underwriting gains and losses, illustrates the cyclical nature of the industry. The earlier cycle bottomed out in 1975 with a $3.65 billion loss and peaked in 1978 with a $2.55 billion gain. Since 1980, underwriting losses have mounted again. However, available estimates by the industry and others indicate that the loss cycle bottomed out in 1985 and that the cycle has not turned upward.

Attachment II illustrates the cyclical nature of property/casualty stock companies over the past 40 years. For purposes of illustration, we used the combined ratio concept, a ratio of claims and expenses to premium income. The attachment reflects the industry's underwriting results and premium pricing strategy; it does not include investment results. As can be seen, stock companies have had several underwriting cycles since 1945.

FINANCIAL OUTLOOK FOR THE INDUSTRY APPEARS FAVORABLE

From all indications, it appears that the trend towards larger underwriting losses has peaked. Available industry estimates show that over the next 5 years the industry expects substantial net gains. Our calculations, made from the industry estimates, indicate an expected net gain before taxes of more than $90 billion over the years 1986–1990.

Analysts of the industry also generally predict favorable industry prospects. For example, an August 1985 study by Salomon Brothers, Inc.,[1] forecasts that premiums written will grow at a 12 percent annual rate over the 1985–1989 period. The same study forecasts a 10 percent growth rate for incurred losses over the period. The study forecasts further that total industry profits will rise annually at a rate of 25 percent over the same period. More recently, the Best's Insurance Management Reports, dated April 7, 1986, estimated that net premiums written in 1985 had increased by about 22 percent over net premiums written in 1984.

PROBLEMS IN THE GENERAL LIABILITY LINE

Although the financial outlook for the industry as a whole appears favorable, the current difficulties in liability insurance are more pronounced in certain lines. One insurance line often mentioned in the context of high premiums and lack of availability is the general liability line. The general liability line, however, does not represent a major portion of the total property/casualty insurance business. Attachment III shows, for 1985, the relationship of this line to other property/casualty lines. The data were estimated by Best's which reports on 27 insurance line categories. For our purposes, we have grouped certain lines into one category; for example, personal and commercial automobile liability is shown as automobile liability.

The figures in this attachment show that the general liability line represents a relatively small portion of the industry, accounting for about 7 percent of all property/casualty premiums written in 1985. However, underwriting losses attributable to this line accounted for about 22 percent of all underwriting losses. It should be

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[1] Salomon Brothers, Inc., "Property/Casualty Insurance Organizations, Five-Year Review and Outlook," 1985 edition, August 1985.

noted, Mr. Chairman, that if a given company had specialized in this line of insurance, the proportion of losses could have been higher.

Attachment IV shows our analysis of the amount of additional earned premiums that would have been needed for the general liability insurance line to have broken even in 1984. Basically, our analysis shows that the line could have broken even with an approximate 30 percent additional increase in earned premiums. (1984 is the most recent year for which we are able to make these estimates; the necessary data is not yet available for 1985.)

I would like to make three points about our analysis. First, our analysis is based upon aggregate industry financial data which already includes the premium changes that took place in that year. Second, it is not appropriate to compare our industrywide break even analysis to individual policy rate increases. Third, let me repeat my earlier observation that the experience of individual underwriters could vary significantly from these industrywide aggregates.

CONCLUSION

In conclusion, Mr. Chairman, available financial information shows that, over the long term, the profitability of the property/casualty industry has been cyclical in nature. The data further indicate that over the last 10 years the industry has been generally profitable. There was an overall loss in 1984; however, the industry projects increasing premiums and more favorable prospects for the next few years. Indeed, the industry's estimates indicate a return to profitability in 1985. The data also show that while general liability insurance has received considerable attention recently, it represents a relatively small portion of the industry overall. Finally, our calculations show that, for 1984, the general liability line could have broken even with a 30 percent increase in earned premiums.

That concludes my statement, Mr. Chairman. We would be pleased to respond to questions.

ATTACHMENT I

ATTACHMENT I

UNDERWRITING GAINS, INVESTMENT GAINS, COMBINED UNDERWRITING AND INVESTMENT GAINS: ALL COMPANIES -- CONSOLIDATED BASIS[a] YEARLY 1974-1985 ($ in millions)

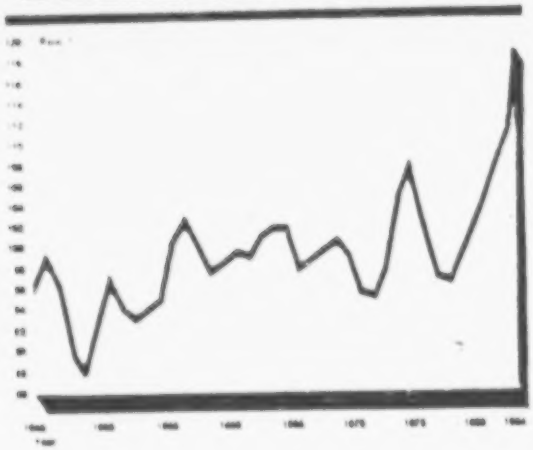
Year	Underwriting gains/(losses)	Investment gains/(losses)	Total
1974	(1,974)	(2,443)	(4,417)
1975	(3,653)	7,009	3,356
1976	(1,726)	7,173	5,447
1977	1,926	5,063	6,989
1978	2,548	7,758	10,306
1979	24	11,610	11,634
1980	(1,712)	15,870	14,158
1981	(4,464)	10,858	6,394
1982	(8,303)	18,387	10,084
1983	(11,088)	19,441	8,353
1984	(19,379)	17,875	(1,504)
1985 Est.	(22,360)	29,720	7,360

[a]Consolidated totals eliminate double counting by excluding intercompany transactions between parent and subsidiary companies.

ATTACHMENT II

ATTACHMENT II

Combined Underwriting Ratios for Property/Casualty Stock Companies for the Years 1945-84[a]



Year	Ratio	Year	Ratio
1945	95.8	1965	101.9
1946	98.8	1966	98.1
1947	96.3	1967	98.9
1948	91.2	1968	100.0
1949	87.6	1969	100.6
1950	93.0	1970	99.3
1951	97.1	1971	95.8
1952	94.4	1972	95.4
1953	93.1	1973	98.2
1954	93.6	1974	105.0
1955	94.9	1975	107.5
1956	100.5	1976	102.0
1957	102.9	1977	97.0
1958	100.0	1978	96.6
1959	97.8	1979	99.6
1960	99.4	1980	102.4
1961	99.4	1981	104.9
1962	99.0	1982	108.7
1963	101.0	1983	111.8
1964	101.9	1984	119.0

[a]A combined ratio is a ratio of claims and expenses to premium income. Ratios below 100 represent underwriting gains and ratios above 100 represent losses.

ATTACHMENT III

Net Premiums Written and Underwriting Gains/Losses
Estimated for All Insurance Lines for 1985
($ in billions)

Selected long-tailed insurance lines[a]	Net premiums written	Premiums as a percent of all lines	Underwriting gains/(losses) after dividends	Underwriting gains/(losses) as a percent of all lines
Automobile liability	$33.9	23.8%	($7.6)	30.9%
Workers compensation	15.7	11.0	(3.3)	13.4
General liability	10.2	7.2	(5.3)	21.5
Medical malpractice	2.3	1.6	(1.6)	6.5
Subtotal	62.1	43.6	(17.8)	72.3
Selected short-tailed insurance lines[a]				
Automobile physical damage	23.4	16.4	(0.1)	0.4
Homeowners multiple peril	13.6	9.5	(1.6)	6.5
Commercial multiple peril	11.2	7.9	(2.7)	11.0
Subtotal	48.2	33.8	(4.4)	17.9
All others[b]	32.2	22.6	(2.4)	9.8
Total all lines	$142.5	100%	($24.6)	100%

[a]Long-tailed insurance lines are lines characterized by third-party involvement (an injured party other than the insured) and by settlements that will occur in an unknown future time period. Short-tailed lines, on the other hand, typically involve only two parties (the insurer and the insured) and settlements that will take place within a relatively short time frame (generally a year or two) following a claim.

[b]Includes such long-tailed lines as reinsurance and group accident and health, as well as such short-tailed lines as burglary and theft, and aircraft.

ATTACHMENT IV

ATTACHMENT IV

Break Even Analysis for the General Liability Line in 1984[a]
($ in millions)

Premiums earned	$6,251	
Net investment income[b]	1,665	
Total Revenues		$7,916
Less:		
Net losses incurred	$5,456	
Expenses and dividends	4,100	
Total Outlays		9,556
Net income/(loss) before taxes		($1,640)
Computation of Additional Earned Premiums Needed to Break Even:		
Sales commissions on additional premiums ($1,640 / (1-.121) - $1,640)[c]		226
Additional earned premiums needed to break even before commission		$1,866
Percent additional earned premiums needed to break even ($1,866 / $6,251) x 100)		29.8%

[a]Our break even analysis is based on aggregate industry financial data for 1984. As such, it would not be appropriate to compare the results of our analysis to individual premium increases or premium rate changes.

[b]Net investment income was allocated to the general liability line on the basis of the portion of net investment income the industry reported as having been set aside for reserve liabilities--amounts set aside for loss reserves, loss adjustment expense reserves, and unearned premium reserves. Neither capital gains nor the portion of net investment income reported by the industry as having been allocated to capital and surplus were included because these amounts are not readily available.

[c]Commissions paid in this line averaged 12.1 percent of premiums written.

Senator KASTEN. Our next witness on this panel is Mr. Robert Hunter of the National Insurance Consumer Organization.

Mr. HUNTER. Yes. Mr. Chairman, I am accompanied today by Jay Angoff, our counsel, as well.

I am going to focus particularly on the insurance industry and its role in the crisis. And a lot of what I would say has already been said by the GAO. It is a cyclical industry, and there has been a down cycle of late which has caused the current crisis in many lines of insurance.

Based upon that, there have been several proposals for so-called reform, including that of the President of the United Strates in his tort-policy working group proposals. We oppose these so-called reforms because we think that they are not thought through, that they have not analyzed any data to show a need, that they are based on a biased attitude of protecting the wrongdoer as opposed to protecting victims of wrongdoing. And we believe that they should be rejected by the Congress.

Regarding the Danforth bill, we think that is a thoughtful and conscientious effort to make the legal system more efficient; it gives—in exchange for the rights that are taken away from victims, it gives them something in return and has, in other words, a quid pro quo for the injured victim who would be willing to give up his rights.

When I was the Federal insurance administrator under President Ford, we studied no-fault auto insurance and President Ford did support national no-fault auto insurance and so did I because we had the analysis and because we did that sort of bill drafting, that is, in exchange for limitations on the right to sue under the no-fault proposals we made. We gave certain benefits: for instance we would pay promptly economic damages.

We think there has to be that sort of balance in a bill from a consumer perspective. The weakness that we still see in the Danforth bill is the lack of any quid pro quo from the insurance company. I assume that one of the reasons for the bill is to reduce the overall system cost; that has not been costed out.

We would like to see an analysis based upon closed claims; either the old survey that you have or a new survey, preferably, on how much would rates go down if this was enacted. And we would like to see some guarantees that the insurers would pass through those savings and not pocket them. It would be, we think, an awful outcome if victims were asked to give away rights and in return the insurers profited. And we think that has to be controlled.

But although we have some specific problems which we have in the handout that we are going to hand in later, with the Danforth bill, we find it a far preferable alternative and we would be happy to work with the committee in the development of a better draft of that bill.

[The following information was subsequently received for the record:]

NATIONAL INSURANCE CONSUMER ORGANIZATION

PRELIMINARY OBSERVATIONS ON THE DANFORTH BILL

I. *The Danforth bill is a thoughtful and conscientious effort to make the legal system more efficient.*—Unlike the Administration's bill, which takes away the rights of injured people and gives them nothing in return, the Danforth bill both gives something to and takes something from both injured people and those who cause injury.

II. *However, the Danforth bill has several major defects.*

A. *It requires no quid-pro-quo from the insurance industry.*—Under the Danforth bill, catastrophically injured people are effectively prevented from recovering more than $250,000 for their pain and suffering. Such a limitation may not be fair under any circumstances. But it is clearly unfair to ask the most severely injured to give up their rights without also requiring the insurance industry to roll back its rates. Without a quid-pro-quo from the insurance industry, the Danforth bill limits the rights of the catastrophically injured, without any guarantee that such a limitation will bring insurance rates down.

B. *It gives the defendant the unilateral power to limit damages for pain and suffering to $250,000, even for the most catastrophically injured people.*—The Danforth bill reflects the policy judgment that this limitation is a fair trade-off for giving less severely injured people an increased likelihood of quickly recovering at least their net economic loss. We would hope that some alternative could be worked out that would not so adversely effect the most severely injured.

C. *It limits punitive damages to twice the amount of compensatory damages.*—In the American legal system, there is no criminal sanction for corporate recklessness; punitive damages under the tort law are the proxy for criminal penalties. For example, it was only large punitive damage awards that caused A.H. Robins Co. to recall the Dalkon Shield IUD, after a decade of stonewalling; and when Ford Motor Co. refused to make a $11 improvement in its gas tank even though it knew that 180 people would be killed and 180 burned without the improvement, a jury justly punished Ford with a large punitive damage award. Limiting punitive damages, as the Danforth bill does, would substantially decrease the only deterrent to corporate recklessness that exists in our legal system.

D. *Its effect on state law is unclear, especially in cases where one defendant—e.g., a manufacturer—is subject to the standards of the Act, and other defendents—e.g., a doctor or a driver or a municipality—are subject to the standards of state law.*—For example, if the state law method for assessing the responsibility of multiple parties is different from that in the Danforth bill, an irresolvable conflict would seem to result.

III. *The Danforth bill limits liability in several other objectionable ways.*—For example:

A. It drastically restricts joint and several liability, and invites the "empty chair" defense. Sec. 307.

B. It substantially eliminates strict liability for intermediate sellers. Sec. 305.

C. It establishes a statute of repose. Sec. 308.

Senator KASTEN. Our next witness is Mr. Dennis Connolly of the American Insurance Association.

Mr. SUTTLE. My name is Bill Suttle. I am here with Peter Lefkin of our staff. Dennis Connolly was scheduled to appear and unfortunately is detained in Providence, RI. We, too, have a detailed statement for the record. It has been filed and we will keep our comments quite brief and then be happy to respond to any questions that the chairman might have.

We are pleased to have the opportunity to address the revised product liability legislation recently introduced by you, Mr. Chairman, and by Mr. Danforth. Both bills are a response to severe problems confronting product manufacturers and sellers throughout the country. We are genuninely appreciative of the effort of both of you in the search for a legislative solution. Both new bills contain provisions that we view as highly desirable and responsive to serious problems in today's volatile product liability climate.

In recent years courts have abandoned many principles of traditional law and now frequently impose liability not on the basis of fault but on the defendant's ability to pay. Compounded with judicial trends expanding liability are other court decisions which have effectively eroded traditional defenses.

Also, several jurisdictions have held a product manufacturer liable for a risk that could not have been discovered by any scientific means at the time the product was made. The net effect of decisions like these is that manufacturers who acted responsibly are held equally liable with those who acted wrongfully. This not only undermines the principle of deterrence in our tort system but it makes it difficult to impossible for insurers to predict some risks they are asked to underwrite.

For this reason AIA is strongly supportive of section 5 of your measure. It would reaffirm the principles of traditional tort law and its enactment would impart greater certainty to the tort system. Liability would be imposed on fault; it would make it possible for risk managers and for insurers to predict the potential liability associated with the production and distribution of products.

We note that the legislation introduced by your colleague, Chairman Danforth, does not address the issue of substantive tort reform to the extent that we think necessary. Section 304, which governs product sellers, is commendable, but we would strongly recommend that the bill be amended to include more of the principles in your draft which were included, also, in the original title III of Mr. Danforth's proposal. We are pleased that both measures address the issue of joint and several liability and we commend Senator Pressler for his contribution in bringing this concept into the public light.

As the panel is aware, the imposition of joint and several liability has meant that defendants who are only marginally responsible for injury may nonetheless be required to pay for all compensation. This makes it extremely difficult for an insurer to assess the risk of the insured. Insurers providing coverage for a manufacturer might not only be underwriting the activities of their own insured but also of others over whom they have no control and from whom no premium is collected.

The AIA is strongly supportive of section 6 of your bill which limits and returns the application of joint and several liability to instances where the parties responsible for the harm were acting in concert. Mr. Danforth addresses this issue in both sections 303 and 307 of his bill. While we appreciate his recognition of the problem, we believe that that language does not go far enough.

It would Impose several liability in all civil actions; yet in instances where one joint tortfeasor does not come forward with payment, the other parties would have to share the cost of the amount remaining unpaid. Under this scenario, insurers would still be operating in an environment in which they are providing coverage to entities they have not insured.

Our final comment is directed toward the issue of workers' compensation offset and product liability claims. We are supportive of provisions in both the Danforth and Kasten bills which reduce a plaintiff's recovery for the amount of workers' compensation benefits received. This would leave the claimant whole while signifi-

cantly reducing transaction costs. In particular, AIA applauds section 305(c) of Mr. Danforth's draft, which prohibits any third-party suit by an employer or its insurer against the manufacturer or seller of a product for workers' compensation benefits that arise from the claim. We would recommend that your bill also adopt this prohibition.

In closing we thank both you, Mr. Chairman, and your colleagues for the many courtesies you have extended. We look forward to working with you and your staffs in the search for comprehensive solution to the product liability problem, perhaps one that embodies the best factors of both bills under consideration today.

Thank you, sir.

[The statement follows:]

STATEMENT OF THE AMERICAN INSURANCE ASSOCIATION

The American Insurance Association (AIA) is a trade association which is composed over over 170 property and casualty insurance companies. The member companies of the Association provide the majority of the product liability insurance coverage written throughout the United States. We have been asked to testify on the substitute to S. 100, which has been introduced by Senator Kasten along with the substitute to S. 1999, which was introduced by Senator Danforth and published in the Congressional Record on May 12, 1986. We commend both Senators for their efforts and believe that the work performed thus far by them and their staffs has been very beneficial in the search for a legislative solution to the product liability problem.

As our Association reported to this Committee on March 14, 1986, product liability rates have increased sharply during the last two years. The rates charged by our member companies reflect the risks associated with the production and distribution of products. The Committee is well aware of the problem and has not in previous hearings that the number of federal product liability suits has increased by 750% since 1974. During the same period of time the average jury verdict has increased from under $400,000 to over $1.8 million in product liability cases.

American pharmaceutical and chemical companies face increased exposure to liability at every turn resulting in higher liability insurance rates and significantly reducing their ability to meet the challenges from international competitors who are not so burdened by court decisions in their countries. In some jurisdictions this is true even where companies have done everything possible to avoid injury and have met or exceeded all legal and regulatory requirements.

The Administration's Tort Working Group analyzed the problems facing product manufacturers and sellers and identified the following causes of higher product liability rates: 1) the movement toward no-fault liability, 2) the undermining of causation, 3) the large growth in non economic damage awards, and 4) the extraordinary transaction costs of the civil justice system. These lead to unpredictability and have caused insurers to both reduce policy coverage and charge higher prices to reflect the greater risk involved in placing products into the marketplace. AIA therefore concurs with the Administration's analysis and is supportive of the product liability legislative proposal which it drafted and which has been introduced by Senator Kasten. Our comments will be directed towards improvements in both the Kasten and Danforth measures that will restore predictability back to the product liability insurance marketplace.

COMMENTS ON THE DANFORTH AND KASTEN SUBSTITUTE

AIA strongly supports the Chairman's decision to delete Title II of the original version of S. 1999. We testified against provisions in the section that created a presumption of causation where a plaintiff was exposed to a chemical or toxic agent. We also expressed our concern about provisions in the Title that would have placed the burden of proving that a product is not 'unreasonably dangerous' on the manufacturer. Both provisions would have allowed a plaintiff to recover without a demonstration of causation and would have invited a large number of product liability claims and may have exacerbated the trend towards higher rates.

We also strongly support Section 305 of the revised Danforth bill which establishes uniform standards for the offset of workers compensation benefits. This would leave the claimant full while significantly reducing transactions costs. In particular,

AIA applauds subsection (c) which prohibits third party suits by an employer or its insurer against the manufacturer or product seller defendant for workers compensation payments that arise from a product liability claim. We would recommend that the new Kasten legislation be amended to provide for the same type of ban on subrogation.

Our third comment is addressed to provisions in the Danforth bill which relate to the imposition of joint and several liability. AIA believes that recent trends expanding this doctrine must be curtailed if stability is to brought back to the insurance marketplace. In several court decisions, defendant's who are only partially responsible for an injury are nonetheless required to pay for all of the costs of compensation. This has made it extremely difficult for an insurer to assess the risk of the insured. Insurers providing coverage for a manufacturer might not only be underwriting the activities of their own insured but also others over whom they have no control and from whom no premium is received.

Senator Danforth addresses this issue in two sections of his bill. Under Section 303(b), a defendant whose offer to tender net economic loss before trial is rejected will find their dignatory loss capped at $250,000. Joint and several liability would be limited to net economic loss. Defendants would be severally liable for the remainder. In addition, Section 307 combines the limitation on joint and several liability with the application of comparative responsibility. The plaintiff's recovery for compensatory damages is reduced in proportion to his responsibility for the harm suffered. Several liability is imposed except in instances where a joint tortfeasor failed to make its contribution. Should this occur the plaintiff would be allowed to recover in proportionate remaining shares from the other parties.

AIA believes that the language in the Danforth bill is still inadequate. It allows a plaintiff to recover huge awards in circumstances where the product manufacturer or defendant was only marginally responsible for the harm which occurred. Insurers would still be operating in an environment in which they are providing coverage to persons whom they have not insured. AIA recommends that both Sections 303 and 307 be amended to incorporate the provisions relating to joint and several liability that have been drafted by Senator Pressler and which are included in the Kasten legislation.

We also note that the Danforth substitute seeks as a laudable objective the reduction of the extraordinary transaction costs that have been associated with product liability claims. We share this goal, believing that for too much money is expended on the legal system and deprives claimants of compensation while driving up prices to consumers in our society.

Nevertheless, AIA that the procedures established under Mr. Danforth's bill provide little incentive for a claimant to settle for net economic loss while imposing significant costs on the defendant who fails to settle. Thus a defendant who declines to settle, and is later found liable, is required to pay a 25% surcharge plus 1% per month from the date of rejection of the claim. This would certainly provide a strong incentive for a plaintiff's attorney to inflate the anticipated amount of net economic loss and delay the final resolution of the case. Yet in instances where, the defendant prevails, the plaintiff would only be required to pay the legal fees if a court found that the attorney was not pursuing a good faith action. This provision reflects the authority given to judges in several state courts and as a practical matter it is seldom used. It is therefore unlikely to have the desired deterrent effect on the number of frivolous claims filed.

As an alternative AIA is considering proposals that would provide stronger incentives for parties to reach an agreement before going to trial. For example, before going to adjudication either side could file their final offer of settlement. If the other side declines the offer, the matter would go to adjudication. Should the award exceed the plaintiff's offer, a surcharge could be imposed. Should the award be less than the defendant's offer, a reduction would occur. This would provide an inducement for parties to come forward with an offer which realistically reflects the damages suffered and therefore would therefore lessen the differences which exist between the claimant and plaintiff. It has been our experience that settlements most frequently occur where the differences between the parties are smallest, and legislative language which would induce parties to minimize their differences would certainly result in a large number of cases being settled before trial. It should be emphasized that AIA is reviewing several proposals that have been advanced on this matter by legal scholars. We are therefore not advocating any particular approach to settlement inducement and believe that the Committee would be well advised to take a close look at the proposals being circulated that address this problem.

AIA also believes that Section 306 of the revised Danforth darft relating to punitive damages is a positive improvement over the original version. The provision pro-

tects a claimant from punitive damages if their product was in compliance with government standards at the time it was manufactured. It also limits the imposition of damages to instances where the plaintiff presented clear and convincing evidence that the harm suffered was the result of "conduct manifesting a manufacturer's or product seller's conscious, flagrant indifference to the safety of those persons whom might be harmed by the product." The adoption of this provision will remove much of the uncertainty that now surrounds the imposition of punitive damages.

Our final comments are directed towards the need to redress current trends in tort law which impose liability, not on the basis of fault, but on the defendant's ability to compensate the unfortunate. Recent court cases have allowed claimants to recover in instances where they could not determine whether or not the defendant's product was the cause of the harm. Similarly, plaintiffs have been awarded judgments even where they have misused, abused or altered a product.

Perhaps most disturbing are court cases which hold a product manufacturer liable for risks that it could not be discovered by any scientific means at the time it made the product. Starting with the *Beshada* case in New Jersey in 1982, courts in over four states, have imposed this new type of aboslute liability on a manufacturer. The most recent case was in the conservative state of Louisiana in the case of *Halphe* v. *Johns Manville Sales Corp*, ——— So.2d.———(No. 85-CQ-0445, La. 1986). Here the court ruled that, "the fact that a risk or hazard related to the use of a product was not discoverable under existing technology or that benefits appeared greater than they actually were are both irrelevant." The net effect is that manufacturers who acted responsibly are held equally liable as those who have acted wrongfully. This not only undermines the principle of deterrence in our tort system but makes it impossible for insurers to predict the risks that they are underwriting. In view of this trend it should not be surprising that insurers are charging higher rates or are unwilling to provide coverage on some types of products. We are therefore highly supportive of Section 5(4) of the Kasten bill which holds that a person may not be liable for an injury resulting from a defect or failure to adequately warn of dangers which were scientifically unknowable at the time the product was made.

We are also supportive of the overall principles surrounding Section 5 of the Kasten measure. It is a proper attempt to reaffirm the principles of traditional tort law and its enactment would impart greater certainty to the tort system. This would make it possible for risk managers and insurers to predict the potential liability associated with the production or distribution of products.

The Danforth legislation unfortunately does not yet address the issue of substantive tort reform except in Section 304 which governs the activities of product sellers. While its offer of procedural reform could reduce transaction costs, upredictability in the underlying tort system could easily offeset these benefits. We therefore would urge strongly that the legislation be amended to reflect the principles that were espoused in Title III of his earlier draft.

CONCLUSION

The American Insurance Association remains mindful of the fact that substantive reform of tort laws governing product liability is a difficult legislative task in which many competing interests must be balanced. Those who have been injured as a result of another's tortious harm should be adequately compensated. Yet the current system operates primarily to the benefits of the attorneys who handle the cases. The legal system has been compared to a lottery in which some recover beyond the harm they suffered while others are inadequately compensated with their legal fees dissipating much of the money that is needed to redress their harms. Substantive tort and transaction reform are desparately needed. Both Senator Kasten and Danforth should be commended for their efforts on behalf of consumers and American industry to reform the system, and we stand prepared to work with them in the months ahead to provide a comprehensive solution to the multi-faceted product liability problem.

Senator KASTEN. Mr. Suttle, thank you very much. There is a vote occurring on the Senate floor. We have got about 3 or 4 minutes to go. So I am going to recess the committee and we will be back and the committee will resume business in roughly 5 minutes. The committee will stand in recess.

[Brief recess.]

Senator KASTEN. The committee will come to order. Our next witness on this panel is Mr. Leslie Cheek, vice president of Crum & Forster Insurance Co.

Mr. Cheek.

Mr. CHEEK. Thank you, Mr. Chairman.

If I might, could I put our prepared statement in the record and spend my 5 minutes before you dealing with some of the points that were made by earlier witnesses?

Senator KASTEN. Without objection, the entire statement will appear in the record.

Mr. CHEEK. Very good.

I would like first, Mr. Chairman, if I could, to in effect extend the GAO's commentary on the results in general liability for 1984 by putting into the record a report released yesterday by the Insurance Information Institute which carries the analysis onward into 1985. With the GAO testimony plus this report, you get a very clear picture of what has been going on in the troubled general liability line.

The second thing I would like to do is to go back to some earlier comments about the data compiled by the National Center for State Courts, suggesting that somehow there is no litigation explosion. I think it is only fair to say that that report is fundamentally misleading for a very simple reason: It fails to account separately for automobile accident-related lawsuits as opposed to those in the general liability field. I think it must be pointed out that automobile accidents are involved in anywhere from half to two thirds of all tort filings and that therefore any decrease in automobile cases can readily offset potentially gigantic increases in other types of cases—for example, product liability, medical malpractice, professional liability and municipal liability.

And there has, in fact, been a substantial decrease in automobile-related suits for a variety of reasons: The 55-mile-an-hour speed limit and no-fault automobile insurance statutes, which curtailed lawsuits in some States by as much as 80 percent in New York, for example; 62 percent in Massachusetts; 44 percent in Minnesota; and 33 percent in Oregon, according to the recent Department of Transportation update of its 1977 no-fault auto insurance study.

The third thing I would like to focus on is the comments that the witness from South Carolina made about the 210-year history of the collateral source rule. The collateral source rule, I think, made sense when we had a tort system in which liability was based on wrongful conduct. We now have a system that increasingly imposes liability without regard to conduct.

In addition to that, the pervasiveness of health benefits, workers' compensation, and nonoccupational disability income protection in our society is so enormous now that it simply does not make sense to permit recoveries in a tort framework of losses that have already been paid. And, therefore, I think it would be a serious mistake to ignore the fact that, with most losses of income and medical expense already compensated, tort litigation today is an entrepreneurial opportunity for most people, rather than a means of seeking redress for uncompensated loss.

Finally, I would like to talk about joint and several liability. The case that the gentleman from South Carolina who was on the pre-

vious panel cited is a perfect illustration of what I would call the perversion of joint and several liability. The doctor and the rototiller manufacturer in that case did not pursue jointly and consciously a similar pattern of conduct that was likely to result in harm.

The injuries that they inflicted on that plaintiff were clearly separate and distinguishable, and in the system that you have proposed in your bill and in the system to which Senator Danforth's amendment moves toward, the principles of comparative fault would easily be able to distinguish the relative contributions of the rototiller manufacturer and the doctor to the plaintiff's harm.

It seems to me that the rule you have proposed in your bill—that only where there is a conscious pursuit of a course of conduct on the part of two or more defendants that is likely to result in harm should joint and several liability attach—is entirely appropriate. In other instances it seems to us that the sounder rule is a pure several liability system.

Thank you very much, Mr. Chairman.

[The statement follows:]

STATEMENT OF LESLIE CHEEK III, VICE PRESIDENT-FEDERAL AFFAIRS, CRUM & FORSTER INSURANCE COMPANIES

Mr. Chairman and Members of the Subcommittee: We appreciate this, our second opportunity this year to participate in the fast-moving process toward consensus on fair and balanced product liability reform legislation. As the Nation's second-largest writers of general liability insurance, which typically includes products and completed operations coverage, we have a significant economic stake in the successful conclusion of this process.

Some may argue that the ten years during which product liability legislation of one sort or another has been before the Congress is ten years too long to wait for rational and predictable product liability rules, but we believe that the complexity of the issues involved has justified the deliberate pace of Congressional action.

Now, however, we believe that Congress is within striking distance of the consensus necessary to enact legislation this year. We base this belief on the innovative approach proposed in Senator Danforth's Amendment to S. 1999. The Danforth amendment, in our view, nearly completes the necessary evolution that product liability reform legislation has undergone.

If one thinks of the product liability system as a pipe whose diameter now permits loss dollars and associated transaction costs to flow through it in inappropriate ways, there are four possible approaches to modulating that flow: Either scrap the pipe in its entirety and put in a new one; seek to restrict the bases upon which losses may enter the pipe; place limits upon the nature of the losses that flow out of it; or balance the restrictions at either end in order to assure an even flow of losses through the pipe.

In the course of its study of product liability reform proposals, Congress has plainly rejected the first approach, on the common sense ground that it is easier to correct deficiencies in a proven system than to replace it with an untested system that may be far worse.

Congress has also rejected legislation that focuses solely on what goes into the pipeline, out of an understandable concern that "freeze-framing" all of today's mainstream product liability rules may leave courts incapable of fashioning remedies for harms whose nature cannot now be divined.

And, in introducing his amendment to S. 1999, Senator Danforth appears to have signaled that he will not accept a bill which would prohibit the compensation of non-economic losses in product injury claims.

Thus, by a healthy process of elimination, Senator Danforth has brought the evolution of product liability reform legislation to its final stage. We think the approach proposed—adjustments at both ends of the pipe in the context of procedures to encourage voluntary, non-litigative settlement of claims—is fundamentally sound.

But it is important that the openings at either end of the pipe be neither too wide nor too narrow, and that both openings permit an even and predictable flow of

losses through the pipe. In the balance of this statement, we would like to propose some adjustments at both ends of the pipe.

At the front end, which proposes controls on what we in the insurance business call "claim frequency," we are concerned that Title III does not provide product manufacturers the fairly fundamental procedural protections afforded product sellers in section 304.

In addition, we are concerned that Title III does not preclude the States from imposing retroactive product liability on a manufacturer for failing to detect or warn of a product hazard that he either did not know of or couldn't scientifically have discovered at the time the product was made. Insurers obviously cannot price retroactively imposed liability of this nature, and failure to preclude it will perpetuate the serious insurance availability and affordability problems now plaguing the manufacturers of any product with a long-latency disease-causing potential.

Similarly, although sections 303(b) and 307 move in the direction of limiting current perversions of the concept of joint and several liability, we believe that the bill should foreclose joint liability except where the claimant can demonstrate that defendants acted together in conscious pursuit of a common scheme that was likely to result in harm. Insurers cannot measure or price the kind of vicarious liability now permitted under the laws of 34 States, and that would still be possible under the proposed amendment.

Finally, we believe that the incentives for product manufacturers and sellers and claimants to settle meritorious claims without resort to litigation are improperly balanced. Section 207(b)'s penalty for manufacturers or product sellers who reject or fail to respond to a claimant's valid settlement claim is not only unusually harsh in itself, but would encourage over-reaching and delay on the part of claimants and force manufacturers into settling marginal claims that they would otherwise reject. There is no countervailing incentive, other than a $250,000 cap on dignitary loss, for a claimant to accept a defendant's tender of net economic and/or dignitary loss.

We would suggest balancing the incentives by imposing an automatic penalty of a percentage of the difference between a claimant's and a defendant's last offer on the losing party. For example, if the claimant sought $15,000, the defendant tendered $10,000; and the penalty were ten percent of the $5,000 difference, a successful claimant would collect $16,500, while a prevailing defendant would pay only $9,500.

At the back end of the pipe, which would limit what we call "average claim severity," we are troubled by the potential arbitrariness of the absolute limit of $250,000 proposed in section 102's definition of "dignitary loss." The predictability of the product liability system would be better served, and its costs reduced more, by a limitation on dignitary loss that varied with the amount of net economic loss involved. Moreover, a multiplicative approach to dignitary loss would prevent the overcompensation of small cases and the undercompensation of serious injuries that a cap guarantees.

With a cap, a claimant with $10,000 in net economic loss and a minor but "permanent impairment of a bodily function" can seek up to 25 times the amount of his net economic loss in "dignitary loss," while a severely burned claimant facing multiple skin graft operations and $1,000,000 in uncompensated medical bills would be limited to one-quarter of this amount in "dignitary loss."

If "dignitary loss" were calculated at, say, twice a claimants net economic loss, the $10,000 claimant could recover no more than $30,000 (as opposed to a possible $269,000) but the $1,000,000 claimant could be awarded up to $3,000,000 (as opposed to a maximum of $1,250,000 under the proposed amendment).

We also think that it would be worthwhile to explore a schedule approach to "dignitary loss" for those serious product-related physical injuries which do not result in net economic loss. For example, loss of the physical ability to bear children could be subject to a one-time award of a specified amount.

We thank you again for this opportunity to appear before you. I would be pleased to respond to questions.

Senator KASTEN. Mr. Cheek, thank you very much.

Mr. Finch, could you try, if you could, to respond to the point that Mr. Cheek brought up. Did you, in your study, look at something close to the breakdown that he just went through? It does not seem to me to make sense that in fact these cases are leveling off. We would not have the corridors filled with people and we would not have as much interest on the part of all of us if there was not a significant problem in product liability and related cases.

Did your study—how did you break out your study? Do you have any of the categories that Mr. Cheek spoke about? Do you have any information that would give us a sense of what, if any, effect the decrease in automobile related cases had?

Mr. FINCH. Mr. Chairman, the answer is no on both counts.

Senator KASTEN. You just did not look at that; is that right?

Mr. FINCH. That is right. The analysis that we did and the figures that we used pertain to the financial data recorded by the industry. Our analysis was purely a financial one. So we did not really get into the number of cases and the various categories.

Senator KASTEN. Mr. Hunter, do you have any comment about the effect of one kind of case to another and what, if any, the effect in this whole area—what, if any, effect automobile cases, settlements—whatever is having, I guess we all understand or we all agree that automobile-related cases and damages and claims, et cetera, are in fact going down.

Do you have any other further information that you can shed on this?

Mr. HUNTER. I do not necessarily agree they are going down. Actually, lately they are on their way back up slightly because the 55-mile-an-hour speed limit is being violated more and additionally the lower cost of gasoline has meant more driving.

But there is no question that during the late seventies and very early eighties, there was a decline in claims—in the use of vehicles due to the energy crisis among other things.

Senator KASTEN. Also we do not have these huge settlements in automobile-driving related; we had a Pinto case—one or two others. But overall this is not the category in which most of the people for the past several days have been addressing themselves.

Mr. HUNTER. Well, of course, auto insurance cases can be very serious and there are some very large settlements. But on average they tend to be smaller fender-bender type of deals. But there does not seem to be an explosion in the aggregate number of cases in the overall. Of course, I think that is what the study was addressing; the idea that there is some kind of out-of-hand litigation explosion that is driving up the number of cases in the courts—at least in those States—just is not true.

Senator KASTEN. Mr. Suttle or Mr. Cheek, is there any way that we could develop—we have been through this once or twice, I think—that we could develop a body of knowledge here that would not be disputed? It seems to me that either we have got cases increasing or we do not. And the only question is how to measure them.

Maybe with your help, along with someone like Mr. Finch looking over your shoulder, possibly we could get the kind of categories that we need in order to at least get this basic question of numbers behind us. I think that there ought to be a way to quantify the problem, even if we do not all agree with the solution.

Mr. CHEEK. I think your instincts are right on, Mr. Chairman. I do think that to lump relatively high-frequency, low-severity kinds of cases, like automobile accidents, where the state of the law is reasonably predictable and not subject to wild swings from fault base to a nonfault base, with other kinds of tort cases is confusing. The real problems for us as insurers are not in what are called the

bread-and-butter lines of the insurance business: automobile, homeowners, and the like. They are in the fields that do not represent a very large chunk of our premium volume, 7 percent roughly; but they are the areas in which the law has been changing most radically. Therefore, it is those lines to which I think our attention should be given, and there are very clear and very straightforward data in those areas.

For example, tort actions in Federal court increased from 24,231 in 1974 to 41,593 in 1985. That is a 72-percent increase, while, you have to remember, automobile accident cases were declining about 14 percent. Product liability actions, to be even more precise about the Federal data, increased from 1579 in 1974 to 13,554 in 1985; that is a 758-percent increase.

You can go on and on. Looking at medical malpractice, there was a 362-percent increase during this period. It is clear to us, from the order of magnitude difference in the automobile experience versus medical malpractice, products, and other torts that it is comparing apples and oranges to lump all these together and arrive at a conclusion that there is no problem.

Senator KASTEN. Now we are not trying to legislate on automobiles, either.

Mr. CHEEK. That is exactly right.

Senator KASTEN. Now, Mr. Finch, you cannot reply one way or the other. I know you do not have a dog in this fight, you are just here with information. But you cannot reply one way or the other as to whether Mr. Cheek's numbers are correct or not; is that right? You did not study this question? Or am I wrong, and can you help me?

Mr. FINCH. No. You have captured it exactly, sir. Our dog is circling the perimeter. We cannot engage in the circle in terms of the numbers of cases, that sort of thing. Again, our look was a purely financial one.

I will say that, based upon our look, we share your empathy for the need for some more good, hard facts and some good, hard data on a line-by-line basis.

Senator KASTEN. So we should define the question to you more exactly so that then you could give us a more precise answer? I mean, it should not be that complicated to find out whether what Mr. Cheek just said is right or wrong.

Mr. HUNTER. I think I can say that what Mr. Cheek said is correct but he limited it to Federal courts and that is a problem because there has obviously been a new movement toward Federal courts. But that may be being more than offset by what is going on in the State courts. We have to look at the total insurance system, because that is really what we are talking about that is supposedly in crisis, and we can get, I would think, from the insurance companies the closed claim type of analysis that we got that answered this question 10 years ago with a closed claim survey of a similar type to that which we had 10 years ago.

Those numbers are in the files of insurance companies: How many claims did they pay out in product liability; how much year by year, how did victims fare compared to their economic damages, and the like. And you can get fairly quickly a very good compre-

hensive study, based on the sample and determine what exactly is the answer to your question.

Senator KASTEN. There are additional questions but in the interest of time and particularly all of you, I am not going to prolong this any further. But I would like to have a couple of questions which we will submit. I think that somehow we ought to at least if we could walk into the next meeting with some better understanding of the data base from which we begin. There are a lot of other things that we can argue about, but this is something—we are not asking what is going to happen next year, either; we are simply asking what has happened. And that can be helpful.

I would like to thank all of the witnesses. The record will remain open for 2 weeks, during which time members of the committee may submit questions to various members of the panels that we have had before us. We would hope that you could get back to us with the response within an appropriate amount of time. I would like to thank all of the witnesses here today. We look forward to working with you toward some solution of these difficult problems.

This hearing is adjourned.

[Whereupon, at 3:15 p.m. the committee adjourned, subject to the call of the Chair.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF THE CHEMICAL MANUFACTURERS ASSOCIATION

I. INTRODUCTION AND EXECUTIVE SUMMARY

These comments are submitted on behalf of the Chemical Manufacturers Association (CMA) for inclusion in the record of hearings on product liability reform held on May 20, 1986 before the Subcommittee on Consumer Affairs of the Senate Commerce Committee. The Chemical Manufacturers Association is a non-profit trade association whose members represent more than 90 percent of the production capacity for basic industrial chemicals in the United States.

The need for product liability reform has been extensively studied by the Senate Commerce Committee. The insurance crisis and the continuing escalation of product liability claims and judgments require prompt action to enact the fundamental reforms and bring product liability back within the bounds of reason and fairness. The Administration/Kasten proposal contains all the elements necessary for sound basic reform, including cap on damages, elimination of double recoveries, abolition of joint and several liability and a return to fault based liability. The new Danforth proposal is much improved over earlier versions of S. 1999—particulary in its omission of reduced liability and causation standards. Nevertheless, it is too complex, and lacks the balance in settlement incentives necessary to be successful in achieving settlements and reducing transaction costs. Also it fails to address some of the necessary fundamental reforms which are addressed in the Administration/Kasten proposal. Whatever the merits of individual proposals, however, it is important for the Commerce Committee to reach an accommodation on the proper elements of sound product liability reform so that Congress can move forward promptly to alleviate the liability and insurance crisis.

II. THE PRODUCT LIABILITY CRISIS AND THE NEED FOR PROMPT ACTION

The Senate Commerce Committee must be praised for its early recognition that there is a need for Federal product liability reform and for the in-depth consideration it has given to S. 44, S. 100, and, most recently, S. 1999. These commendable efforts have continued through the hearings on May 20, 1986.

The Committee has heard from all interested segments of society and considered in detail a number of different approaches to product liability reform. Meanwhile, the product liability crisis continues to deepen. Despite the protestations of the trial bar,[1] the liability insurance crisis remains a critical problem for those who must purchase insurance; and many small businesses and product lines are threatened with extinction. Accordingly, the Commerce Committee and the Congress should act soon to initiate the fundamental reforms which are necessary to bring our product liability system back within a reasonable boundary and into a reasonable balance.

III. COMMENTS ON THE ADMINISTRATION/KASTEN PROPOSAL

The committee has before it two key proposals. The first is the Administration's product liability reform proposal which was introduced by Senator Kasten's Amendment No. 1814 to S.100.[2]

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[1] J. Kendall Few, Esq., who represented the plaintiff's trial bar and appeared on behalf of Senator Hollings at the May 20 hearings, presented statistics from one South Carolina county which, he asserted, showed that there is no product liability crisis. Mr. Few, however, failed to note that his statistics were based on all civil jury verdicts—hardly an accurate basis for making assertions about trends in product liability verdicts and settlements.

[2] The second is Senator Danforth's new Amendment No. 1951 to S. 1999 which embodies a new proposal structured around an alternative dispute resolution mechanism. Another alternative dispute resolution proposal was introduced by Senator Gorton on May 20, 1986 as Amendment No. 1968 to S.1999. This introduction, however, was too late for the proposal to receive any substantial consideration at the hearing.

The Administration/Kasten proposal contains the key elements necessary to provide the basic core of product liability reform. Perhaps even more significant is that it does not contain provisions which will further expand the liability system or make it more difficult to bring product liability law back into some reasonable balance.

A. Caps on excessive damages

Perhaps the most important problem addressed by the Administration/Kasten proposal is excessive damages awards.

Historically, the tort system has been intended to compensate persons who suffer wrongful injuries. Today, because of shockingly large jury awards, the tort system has become a kind of lottery, where damage awards bear no relation to any actual injury complained of.

In particular, juries have awarded damages for non-economic losses—pain and suffering, mental anguish, fear of disease, risk of disease and others—out of all proportion to the alleged injury. Economic losses, such as lost wages and medical bills, can be estimated with relative accuracy, based on objective standards of current cost, benefits, and salaries and on quantifiable estimates for the future. Non-economic losses are tied to no such objective standards. They are inherently open-ended and cannot easily be reviewed for reasonableness and comformity with the evidence. Insurers particularly have difficulty predicting non-economic damages, which vary widely from claimant to claimant. Finally, because they are so difficult to quantify, non-economic losses can become a major obstacle to settlement.

Like other non-economic losses, punitive damages are inherently open-ended, lead to lottery-like awards that vary inequitably between claimants, and raise enormous obstacles to efficient settlements. They are a windfall and have no basis in any compensatory purpose. Moreover, where mass torts are involved, large punitive damages can bankrupt a defendant, leading to a windfall for the first claimant but leaving insufficient assets to provide even compensatory damages to others. Moreover, because punitive damages are usually awarded long after the underlying act, they may have little real deterrent effect.

Accordingly, while it is reasonable to permit claimants to seek compensation for non-economic injuries and punitive damages, such damages should be limited. The Administration/Kasten proposal has a cap of $100,000 per occurrence for both non-economic injury and punitive damages. While there will inevitably be disagreement regarding the $100,000 level of the cap, it is clear that a cap for non-economic and punitive damages in the range of $100,000 is a most appropriate means for bringing the product liability system back into a reasonable balance.

B. Reduction of damages by collateral source payments

The reduction of damages by the amount of collateral source payments is also a key reform which is addressed in part by the Administration/Kasten proposal.[3]

Although an injured person should receive compensation for his injury, he should not receive double payments. Nevertheless, this is precisely what happens when a claimant receives both an award in court and payments from disability and medical insurance, workers' compensation and other collateral sources for the same injury. In effect, the worker is compensated twice—and his compensation is paid for by the ordinary citizen through higher taxes, increased insurance premiums and higher prices for consumer products. Under current law in many states, a defendant is not even allowed to introduce evidence of the plaintiff's collateral sources.

To avoid these double payments, the Administration/Kasten proposal provides that the court must reduce any adjudicated damages by the amount of the claimant's collateral sources. The reduction must be in the amount of any past or future payment or benefit which the claimant has received or for which the claimant is eligible on account of the same harm for which damages are awarded.

C. Elimination of joint and several liability

Elimination of joint and several liability is another critical reform accomplished by the Administration/Kasten proposal.

In our legal system, a person generally is considered responsible only for the results that his actions cause. Under the doctrine of joint and several liability, however, a person who is only partially responsible for claimant's injury can be held responsible for all damages. Thus, in current tort law, the necessary connection be-

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[3] The Administration/Kasten proposal is incomplete because it fails to solve the workers compensation subrogation problem and does not require accounting for workers compensation payments where the employer is subrogated.

tween the degree of responsibility and the amount of liability has dissolved. Where no concerted action among defendants is shown to injure the plaintiff, many defendants with "deep pockets" are held jointly liable for the entire judgment, even though they were minimally responsible—perhaps, even, less responsible than the plaintiff. The inequitable result is that parties with little causal responsibility for an injury are held liable for 100 percent of the consequences.

The Administration/Kasten proposal abandons joint and several liability wherever appropriate. In any action where the trier of fact is able to allocate responsibility among the parties, the liability of all parties is several. Only in the case of actual concerted action is the liability of all parties joint and several. Where the comparative responsibility of the parties in any action is at issue and recovery is allowed against more than one party, each party is liable only for that portion of the damages reasonably attributable to his conduct.

D. Return to fault based liability

The Administration/Kasten proposal comes to grips with the issue of fault as a requirement for liability, and requires that liability be based on fault so that the system will no longer be distorted by holding defendants responsible for conduct which was proper. Particularly important for CMA is the provision in the Administration/Kasten proposal that manufacturers should not be liable for unknown or unknowable hazards. Thus, a product does not have a design defect if the manufacturer could not reasonably have known of the alleged flaw in order to correct it or provide a warning.

E. Limitations on contingent fees

CMA also strongly endorses the limitations placed on attorneys contingent fees in the Administration/Kasten proposal. The scheduling of attorneys fees is an effective way of reducing transaction costs and ensuring that frivolous cases are not pursued.

IV. COMMENTS ON THE NEW DANFORTH PROPOSAL

Senator Danforth's Amendment No. 1951 to S.1999 is a positive step forward and a distinct improvement over S.1999 as initially introduced. It abandons the attempt to create a new compensation system with its own reduced standard of liability and relaxed causation requirements. The new Danforth proposal must also be commended for its limitation on punitive damages and for its continuing effort to structure an alternative dispute resolution mechanism which can foster settlements and reduce delays and transaction costs.

The Danforth proposal fails, however, to address adequately the need for joint and several liability reform. In cases of settlement under Title II, joint and several liability issues are dealt with by requiring that the settling defendants pay on a joint and several basis. The settling defendants are than subrogated to the plaintiffs claims and given a cause of action against nonsettling responsible parties. This second cause of action will undoubtedly create substantial litigation and transaction costs. When there is no settlement, the defendants are only severally liable. However, if after a year the plaintiff is unable to recover uncompensated damages from other responsible parties, a new claim for compensation can be asserted against the manufacturer. Again, this approach is unsatisfactory in that it will lead to a second round of litigation and transaction costs.

In addition, the claims system provided in Title II of the Danforth proposal needs a few significant changes before it will be an effective mechanism for fostering settlements, reducing delay and reducing transaction costs. As currently drafted the Danforth proposal creates a settlement claims system which is separated and independent from normal trail management and judicial supervision in the existing product liability system. This will undoubtedly require the creation of many new and detailed sub-procedures and the resolution of many complex new issues. Indeed, there is a real danger that the complexities and uncertainties inherent in the new system would outweigh its advantages by spawning new delays and transactions costs.

We are troubled by the fact that the economic incentives to settle in the Danforth proposal lack balance and are too harsh with regard to defendants. A defendant who rejects a claim (which may demand up to $250,000 of dignitary loss in addition to net economic loss) must, if he loses, pay the substantial penalty of 25 percent of net economic loss plus one percent per month for delay. This incentive seems designed to insure that many settlements will include the full $250,000 of "dignitary loss, even though that concept is extremely novel and undefined and the amount may be excessive. In contrast, a claimant can reject a manufacturer's settlement

offer without risk of sanctions should the manufacturer eventually prevail at trail. Settlements would be greatly encouraged if there was some sanction, such as imposition of attorney's fees, in cases where the claimant who rejects an offer loses at trail.

We are also troubled by the inclusion in the settlement structure of a *Sindell*-type provision. This provision (Section 203(c)) would allow a claimant to single out of his claim any manufacturer which made the type or chemical product which allegedly caused his harm. Even if the manufacturer did not make the product which harmed the claimant, strong and inappropriate incentives are provided to make the manufacturer settle. Accordingly, Section 203(c) should be deleted.

Finally, we note that the Danforth proposal fails to address the issues of fault requirements, limits on non-economic liability, and contingency fees which are properly resolved in the Administration/Kasten proposal. For this reason, the Administration/Kasten proposal seems to be a better mark-up vehicle for Committee action which will lead to any meaningful product liability reform. On the other hand, if the Danforth proposal becomes the mark-up vehicle, it will require substantial change.[4]

V. CONCLUSION

Product liability reform efforts are based on a real need for product liability reform. We urge the Committee to move forward rapidly to arrive at accommodation which will provide meaningful reform by refocusing the tort law on its traditional role of compensating injury caused by wrongful conduct and by reducing transaction costs. Reform proposals which further expand product liability or increase delays and transaction costs should be rejected.

Statement of Gerald J. Mossainghoff, President, Pharmaceutical Manufacturers Association

Mr. Chairman and Members of the Subcommittee: The Pharamaceutical Manufacturers Association represents more than 100 research-intensive companies engaged in the discovery and development of new pharmaceutical products.

Today those companies and the patients who depend on their products are faced with an unprecendented crisis. In large measure the crisis has been created by the courts expanding rapidly the potential liability of pharmaceutical manufacturers. Theories of recovery are being accepted, which old manufacturers responsible for adverse effects of the medicines they develop, no matter how scrupulously they follow precise Federal requirements in developing, testing and marketing their products and no matter how extensively they warn physicians of the risks inherent in the use of these products. At the same time, million dollar awards are becoming commonplace—even for brief illnesses where there has been a complete recovery.

Even well understood products are being attacked under essentially hypothetical theories of causation which are nonetheless being accepted as proven fact. The net result has been the withdrawal from the market of important products and a dependence on a single manufacturer for certain essential products—as other manufacturers have been forced to cease production because of unacceptable liability exposure. Finally, the crisis has created strong disincentives to conduct research and development in certain high risk fields such as contraception. What is most troubling is that all of this is happening to products which are the most prevasively and carefully regulated in the world.

I. THE ROLE OF FDA REGULATION

Food and Drug Administration approval is required prior to marketing a new prescription drug. The FDA testing and approval process consumes, on the average, about ten years and costs about $100 million for each new chemical entity which reaches the market as new drug. The system is comprehensive, including approval of the ingredients, formula, testing procedures, and manufacturing procedures and a word-by-word approval of labeling, including the warning information. For vaccines,

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[4] We note that Amendment No. 1968 to S.1999, introduced by Senator Gorton on May 20, 1986 retains the mistake of singling out toxic materials for reduced causation tests even though such provisions were uniformly criticized at hearing on March 11, 1986 and were abandoned in the most recent Danforth proposal. Such reduced causation rules are fundamentally unjust. Moreover, they will greatly expand the liability system and involve excessive transaction costs. They should receive no further consideration.

the approval process is even more comprehensive since no batch may be released for use until tests of the batch have been reviewed by FDA and found in compliance with its regulations. With only limited exceptions, changes in label information or product composition also require FDA approval and FDA must be notified of all important information—including incidents of new adverse reactions—discovered after initial approval.

The process of government pre-marketing approval for new drugs is so extraordinary that it should be a defense in a tort case involving such drugs, if all government requirements have been followed and absent any withholding from the government of material information.

We are pleased that, under Senator Danforth's proposal, compliance with government standards would be a full defense to a claim for punitive damages. But we believe that it should also be a defense in claims for compensatory damages.

It is neither good law nor good policy to have judges and juries in 50 states second guessing an expert Federal agency on the adequacy of approved warnings. As the Attorney General's Tort Policy Working Group recently stated:

"Greater deference must be paid to government agencies and certain private institutions that have devoted decades of attention and millions of dollars to researching and trying to assess the value of medical and scientific developments. Where such agencies and institutions have determined that particular products, services or techniques are safe or socially beneficial, courts should tread very carefully on overruling those judgments through the vehicle of tort law."

Perhaps it is understandable why, in the context of a particular lawsuit, the jury's instinct will be to compensate the injured victim, even if, to achieve that result, it is necessary to find that the manufacturer should have warned against risks which FDA did not think were substantial.

But, if manufacturers respond to the threat of product liability suits by seeking to add warnings for risks which rational observers agree are remote, in the end the information overload imposed on busy doctors may cause them to pay less attention to the package insert warnings. To warn against everything is to warn against nothing.

The FDA is the appropriate umpire. It does not decide issues relating to the adequacy of warnings in the context of whether a particular plaintiff will or will not recover damages. Rather, with its extensive experience, it takes an overview of the data relating to the safety and use of a drug and decides what risks and benefits should be communicated to the universe of doctors so that a rational choice of therapy can be made.

All prescription drugs occasionally produce adverse effects, and therefore a decision to use them in a particular case is based on a judgment by the treating physician that there is a favorable benefit-to-risk ratio for his or her individual patient. As noted, every word of these warnings is subject to FDA approval and, in fact, the warnings are almost always written in consultation with FDA's medical officers. Nonetheless, in a Massachusetts case, a jury was allowed to decide that a patient-information insert—drafted by the government, required by the government, and dispensed in a manner directed by the government—was inadequate because, although it warned of "blood clots which can be fatal" it didn't use the term "stroke."

In a Kansas case, a jury was allowed to decide that a physician-package insert was inadequate because it did not warn of an association which plaintiff claimed to exist between her illness and oral contraceptives, even though the FDA has considered and dissapproved precisely such a warning.

In summary, allowing lay juries and judges, in effect, to overrule FDA's expert judgments, undermines the federal regulatory scheme and ultimately is a threat to a progressive health care system.

II. PROBLEMS WITH ESTABLISHING CAUSATION

Adverse effects associated with prescription drugs are often the same as occur naturally, which makes determination of causation difficult. But as the report of the Tort Policy Working Group points out, this has not stopped the courts from making causation findings based on fringe scientific or medical opinions, well outside the mainstream of accepted science.

Labeling for the flu vaccine warns about a possible association wiht a rare paralytic condition called Guillain Barre Syndrome. Whether there is actual causation, or what any mechanism of any causation might be, is not known.

In order to get around the adequacy of the warning, some plaintiffs' lawyers introduce evidence of an alleged contaminant which has only been found by their witnesses and which they say is the cause of Guillain Barre Syndrome. These "find-

ings" have been rejected by a scientific journal as being unsubstantiated and are reported nowhere else in the medical literature, and the government has not been able to replicate them. In short, such testimony is well outside the mainstream of science. It is, however, presented to juries, with judges' concurrence, as valid scientific evidence.

In oral contraceptive cases, plaintiffs try to get around extensive warnings to patients and physicians about the risk of blood clots and thromboembolism by asserting, through expert witnesses whose credentials are often marginal and who are often not even physicians, that women with non-type O blood—A , B and AB—are especially at risk from thromboembolism. Plaintiffs then assert that the manufacturer's warnings are inadequate for failure to warn of this specific increased "risk."

This theory of liability against oral contraceptive manufacturers is extremely prevalent, occasionally successful, and has resulted in substantial judgments against manufacturers. This is so despite the fact that the "scientific evidence" upon which it is based is (1) derived largely from one rather obscure epidemiologic study which is sixteen years old; (2) applicable only to the risk of blood clots in the veins, notwithstanding the fact that the theory is most often invoked in cases involving arterial strokes, an interpretation which the author of the original study has specifically repudiated; and (3) has been specifically rejected by the Food and Drug Administration for inclusion in the warnings as being without sufficient scientific merit. Any Federal product liability bill should prohibited the use of such uncorroborated "science" in the courtroom.

III. NEW THEORIES OF LIABILITY

Another problem for the pharmaceutical industry is the tendency of some judges to expand the basis for liability in situations where liability had not previously existed. For many years, it was accepted law that a prescription drug manufacturer satisfied its duty to warn if it conveyed adequate warnings to the learned intermediary, the treating physician. The first exception to that doctrine came in the oral polio vaccine cases when several courts ruled that, in a community vaccination program, the manufacturer must warn the recipient of the vaccine. Some courts have recently extended that ruling to oral contraceptives. In a more recent development, an Illinois court has ruled that a member of the general public stated a cause of action against the manufacturer of the tranquilizer, Thorazine. The plaintiff was a passenger in a car who was injured when the driver drank alcohol after having taken the Thorazine prescribed for him earlier that day. There were no facts alleged that indicated that the manufacturer had failed adequately to advise the driver's treating physicians of the risks of mixing Thorazine and alcohol.

In other cases, courts have substantially narrowed the traditional state-of-the-art defense, and the Wisconsin Supreme Court may have done away with it altogether.

IV. PUNITIVE DAMAGES

Punitive damage awards, which would have been unthinkable a few years ago, have also had a major adverse effect on the pharmaceutical industry.

In a recent case in Illinois, involving the drug aminophylline, which had been marketed for over thirty years without a single claim, the infant plaintiff was overdosed by the hospital which settled for its policy limits, leaving the pharmaceutical manufacturer as the "deep pocket." The jury awarded $9.2 million compensatory and $13 million punitive damages against the manufacturer. Incidentally, the plaintiff's lawyers asked the court to approve a 45% fee and astonishingly the court did!

As mentioned earlier, the punitive damage provisions in Senator Danforth's proposal would eliminate these injustices for FDA-approved drugs. We also applaud Senator Kasten's proposal to put some finite limit on punitive damages in those cases where they may be appropriate.

V. JOINT AND SEVERAL LIABILITY

Joint and several liability is also a problem for our industry and leads to highly unfair results. In a recent Texas case a physician treated a rattlesnake bite with an antivenom product but did not follow directions, and the patient died. The manufacturer settled for a low six-figure amount, although any liability was remote, because the physician involved was judgment proof and, under Texas law, if the jury had held the manufacturer even 1% at fault, the manufacturer would have had to pay the entire award against the physician. That proved to be the right decision because at trial there was an award of about $1.8 million made against the physician.

VI. EXCESSIVE AWARDS

One reason product liability exposure has become uninsurable is that it is impossible for underwriters to make any meaningful prediction as to the amount of damages that juries may award for intangible losses such as pain and suffering. As noted above, multi-million dollar awards are no longer an oddity. Since the costs of these judgments are eventually passed on to society at large, we must ask how much society is prepared to pay for losses which defy rational valuation. Moreover, large awards should be paid out over time and be reduced where the injured party's expenses are paid by a third party under an insurance or disability plan.

VII. ENCOURAGEMENT OF SETTLEMENT

Clearly there are cases that can and should be settled short of full-scale litigation. It may be possible to create, in legislation, suitable incentives for settlement where liability is fairly clear. If any such system is to be truly simpler and faster, it must be limited to making essentially objective judgments. Such a system could, perhaps, deal effectively with issues of net economic loss. It is, however, almost certain to fail if it attempts to make awards for losses as subjective as pain and suffering or emotional harm per se.

Any incentives for settlement must also be balanced and should not, in effect, force manufacturers to settle cases where there are serious questions as to liability or causation, simply because there are substantial penalties for failure to settle. Certainly any basic tort reforms, so necessary to return the tort system to a sound basis, should not be conditioned on the manufacturer having made an offer of settlement.

CONCLUSION

We commend Senators Danforth, Kasten, Gorton and Pressler and the other members and staff of the Commerce Committee for their continuing work to address what has become one of the most pressing problems of the pharmaceutical industry and the country as a whole. We will continue to work with you to develop a true solution. To summarize, we believe this should include:

1. A presumption against liability for manufacturers of FDA-approved (NDA'd) products, rebuttable only upon proof of misrepresentation to FDA or the withholding of information from FDA.
2. Caps on the amount of non-economic compensatory damages (e.g., pain and suffering).
3. Caps on the amount of punitive damages and improved procedures for determinations of punitive damages.
4. Elimination of joint and several liability.
5. Limits on the use of expert testimony.
6. Periodic payment of large awards.
7. Excluding "losses" covered by collateral sources of payment (e.g., insurance).

Mr. Chairman, that concludes my statement.

STATEMENT OF ROBERT PRITZKER, CHAIRMAN, ADVISORY COMMITTEE, PRODUCT LIABILITY REFORM AND PRESIDENT AND CHIEF EXECUTIVE OFFICER OF THE MARMON GROUP, INC.

Mr. Chairman and members of the committee, I welcome this opportunity to provide my views on the product liability crisis and the reforms needed to make this system more equitable. As Senator Kasten mentioned, I have been asked to establish an Advisory Committee made up of leaders in the fight for product liability reform. The purpose of the Committee is to highlight the need for reform through an effective educational campaign.

I believe the nation's productivity and competitive position in the world are paying an unacceptable price due to the uncertainty and confusion caused by an inequitable product liability system. The numbers are evidence of a situation run rampant: $300 billion of our gross national product will be expended in legal costs and damage award in the next four years. This huge amount contributes little to the economy. Almost half this amount is invested in attorneys and legal expenses. No doubt this large sum of capital could be put to more productive uses.

No one wishes to be unfair to victims of injuries, and we realize that the lack of consensus on liability reform reflects that concern. However, I believe that the goals of our system must be to contain the explosive cost of liability while providing full

justice to the victims of injury—by restoring coherence and consistency to our liability laws.

Failure to act now will perpetuate a situation that has grown intolerable: Our balance of trade is affected; sound business planning and decision making is made more difficult, capital formation is stifled, new products and technologies are withheld from the marketplace, and prices of goods are driven up. Ultimately, the costs are passed on to consumers.

These developments stem from the fact that products must be more than safe: they must be almost impervious to consumer misuse and involvement in unpredictable circumstances; they must anticipate scientific breakthroughs—a contradiction in itself, since if discoveries could be predicted, they would not be discoveries; and they must be manufactured with the constant awareness that they do not even need to cause injury for their makers to be obliged to pay full damages. Couple these considerations with the notorious cost of litigation, and it is easy to see how ruinous lawsuits can be for small business and what obstacles impede innovation and technology.

This committee is scrutinizing two initiatives—the Kasten/Reagan bill and the Danforth Bill—which both head in the right direction. I believe any bill must encompass the following principles:

The link between fault and liability must be restored;

Financial responsibility should be proportionate to blame;

Non-economic award should not be an open-ended option; and

Attorneys' financial incentives for excessive litigation should be made less compelling.

We also would like to see an effort to encourage consumers and companies to resolve their disputes before resorting to legal action.

The Advisory Committee on Product Liability Reform wishes to be helpful in restoring fairness and consistency in the way this country handles its obligations to both consumers and producers of our economic well-being. We will make every effort to help bring public understanding to this issue and your faithful search for a rational solution.

YALE LAW SCHOOL
New Haven, CT, May 20, 1986.

Hon. JOHN C. DANFORTH,
U.S. Senate, Committee on Commerce, Science, and Transportation, Washington, DC.

DEAR JACK: I have read the revised version of S. 1999, your product liability bill. Because I will be unable to testify on May 20th, I would like to share my views with you in writing.

I like the basic approach of your bill. Whatever one's broader views on tort reform, it certainly makes sense to increase the efficiency of the existing tort system. The settlement procedures and the incentive structure that your proposal creates would compensate those injured by defective products with greater certainty and speed, properly limit the exposure of most defendants, and greatly reduce costs for both plaintiffs and defendants.

Among the incentives, there is one that I consider particularly important. If a manufacturer refuses to offer relief to a person injured by a defective product, and then is found liable, he would be subject to an added charge over what would ordinarily be his exposure under the settlement proceeding. Some sort of penalty is warranted because otherwise manufacturers would offer to settle only those cases that involve a major misconduct on their part, and would force litigation in most other cases. Without an incentive to settle cases where the seriousness of the misconduct is in doubt, the proposal would essentially serve only as a device to diminish the responsibility of those who are seriously at fault. With this incentive it would even-handedly induce settlements even when one of the parties thought he had a shot at winning under existing law. It is this aspect that serves to reduce administrative costs.

A great strength of your proposal is that it would reduce the costs of the tort system in product liability cases—a goal that is widely shared—without preventing the tort system from doing what it does reasonably well. Consistently with the requirements of justice, the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents. This cost reduction goal has three components.

The first of these is the reduction of the number and severity of accidents. Product liability law seeks to achieve this by placing injury costs on those who can best decide whether avoidance is cheaper than bearing the costs. The problem today is

that manufacturers are forced to bear other costs, costs that their products do not cause: high litigation costs and inflated pain and suffering awards. Your bill would do a great deal to reduce these unnecessary costs.

The second component of cost reduction involves reducing the societal costs of accidents. The way we provide for those injured by defective product is crucially important. The real societal costs of accidents can be reduced as significantly here as by taking measures to avoid accidents in the first place. Unfortunately, the present system while charging manufacturers huge, often uninsurable, amounts is, nonetheless, notoriously bad at compensating those injured by defective products. If your proposal becomes law, many accident victims would recover far more quickly than they do now, and manufacturers would be much less likely to be crushed by torts judgments. In both ways the societal costs of accidents would be reduced. Other countries seek to compensate the injured, without crushing producers, through general social insurance. Your proposal would, instead, achieve compensation in a way that is much more consistent with a free enterprise system.

The third component of accident cost reduction involves reducing the cost of administering our treatment of accidents. Here, the present system is nothing short of catastrophic. The administrative costs that are now paid are wasteful and unnecessary. By fostering speedy settlement without protracted litigation, your proposal would leave everyone concerned better off.

Since your committee will be considering not only your own bill, but also the administration's product liability proposal, I will say a few words about that proposal. I don't like it. The problems with it are many. For reasons that are too complex to go into in this short letter, I believe that in the long run it would help neither manufacturers nor injured parties. Moreover, it would do far less than yours does to reduce administrative costs.

Again, I am pleased that you have come so far in the past year. The revised version of S. 1999 is an excellent piece of work. It is very important that it be enacted.

Best always,

GUIDO CALABRESI, *Dean.*

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